TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 168.

WILLIAM GODFREY, RECEIVER OF THE MERCHANTS' BANK OF SOUTH CAROLINA, AT CHERAW, ET AL., APPELLANTS,

vs.

HARVEY TERRY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED OCTOBER 7, 1875.

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1, 2, 3 THE UNITED STATES OF AMERICA,
District of South Carolina, to wit:

At a circuit court of the United States for the fourth circuit in and for the district of South Carolina, begun and holden at Charleston, in the district aforesaid, on the first Monday in April, 1871, before the honorable Hugh L. Bond and the honorable George S. Bryan, judges of the said United States for the district of South Carolina, holding said circuit court according to the form of the act of Congress in such case made and provided, the following proceedings were had:

HARVEY TERRY
vs.
WILLIAM GODFREY, RECEIVER OF THE MERchants' Bank of South Carolina at Cheraw, et al.

Be it rem'bered that heretofore, to wit, the first Monday in April, in the year of our Lord one thousand eight hundred and seventy-one, the said Harvey Terry impleaded the said William Godfrey, receiver
4 of the Merchants' Bank of South Carolina at Cheraw, et al., in a bill of complaint for discovery and relief, as follows:

Bill.

In equity.

UNITED STATES OF AMERICA,
Circuit.

To the honorable the judges of the circuit court of the United States, within and for the district of South Carolina, sitting in equity:

Humbly complaining sheweth unto your honors your orator, Harvey Terry, a citizen of the State of Virginia, in behalf of himself and all others, the creditors of the Merchants' Bank of South Carolina at Cheraw, who shall come and seek relief by and contribute to the expenses of this suit:

That by an act of the general assembly of the State of South Carolina, ratified on the thirteenth day of December, in the year of our Lord one thousand eight hundred and thirty-three, the several persons in said act named, their successors and associates, were incorporated under
5 the name of the Merchants' Bank of South Carolina at Cheraw, with certain powers and privileges as in and by the said act, reference thereunto being had, will more fully appear, and that said charter was renewed, with a continuance of all privileges then enjoyed under the original charter as aforesaid, by act ratified the twentieth day of December, A. D. 1853, for twenty-one years from the first day of January, A. D. 1856, and that said last act was amended by an act ratified on the twenty-first day of December, A. D. 1854, so as to renew the said original charter for the term of twenty-one years from the first day of January, A. D. 1855. That in and by the said acts the said bank was duly organized, and became vested with all the rights, privileges, and powers therein granted, and, among others, the right to issue bills and notes as a circulating medium, and payable by the said bank in coin on demand; to receive and hold monies on deposit; to make loans and discounts; to deal in exchange, foreign and domestic, and to transact generally such operations and business as legitimately belong to a

6 banking institution; and in and by the said acts it was also provided that the said bank should be liable to such regulations as the general assembly should at any time impose, as in and by the said several acts incorporating and renewing and amending the charter of the said bank, upon reference thereunto had, will more fully appear.

And your orator further shows unto your honors that from the date of the said incorporation the said bank has until within a short period anterior to the filing of this bill used and enjoyed the powers and privileges conferred by the said acts, and engaged in the business of banking, and has issued its bills and notes to a large amount, and has made contracts, and become indebted to divers persons in large sums of money.

And your orator further shows unto your honors that in and by the aforesaid act of the general assembly of the said State entitled "An act to recharter the Merchants' Bank of South Carolina at Cheraw,"
7 ratified on the twentieth day of December, A. D. 1853, it is provided that in case of the failure of the said bank each stockholder, copartnership, or body-politic having a share or shares in the said bank at the time of such failure, or who shall have been interested therein at any time within twelve months previous to such failure, shall be liable and held bound individually for any sum not exceeding twice the amount of his, her, or their share or shares.

And your orator further shows unto your honors that on the first day of March, A. D. 1865, and indeed at an earlier date, the said bank had failed, being then indebted to an amount far exceeding its assets; and that in consequence of such failure, in accordance with the provisions of the said act, the stockholders, copartnerships, and bodies-politic holding shares in said bank, or who had been interested therein within twelve months previous to such failure, became liable for the debts of the said bank for sums not exceeding twice the amount of the
8 shares held by them respectively.

And your orator further shows unto your honors that he has hereunto annexed a list, marked "Exhibit A," of the stockholders, copartnership, and bodies-politic who held shares of the capital stock of the said bank at the time of the said failure, or who were interested therein twelve months previous to said failure, with their respective quota of shares, so far as your orator has been able to ascertain up to the date of the filing of this bill, which exhibit your orator prays may be taken as a part of this bill.

And your orator further shows unto your honors that he has inserted into the said exhibit the personal representatives of such of the said shareholders as he has been able to ascertain have departed this life since the above date, and the husbands of others, being then femes sole, who may have married since.

And your orator reserves the right to amend the said list from time to time, according as he may discover other shareholders, or personal representatives of others who may die, or husbands of such, being
9 femes sole, who may marry; and your orator prays that such other persons, when discovered, may be made parties to this bill.

And your orator further shows unto your honors that by an act of the general assembly of the said State entitled "An act to enable the banks of the State to resume business, or to place them in liquidation," approved March the thirteenth, A. D. 1869, it was provided in words as follows, that is to say: "That all banks incorporated by the authority of this State, and which have by said authority issued bills of credit

known as bank bills, and have failed to comply with said corporate privileges by refusing to pay their bills of credit, and are now thus failing to comply with the provisions of said act of incorporation in this particular, and shall so continue to violate said act until the first day of December, A. D. 1869, shall forfeit all corporate rights and privileges, and are forbidden to transact any business as banking institutions;" and in the second section of the last-mentioned act it is provided
10 that the judge of the circuit in which such bank or banks may be situated, upon notification made to him of each and every bank failing to comply with the requirements of the first section of the same act aforesaid, shall appoint a suitable person as receiver of the property and assetts of each of the aforesaid banks, who shall, after having filed a bond with good and sufficient security, to be approved by the said judge, take charge of the property and assetts of the bank.

And your orator further shows unto your honors that the said Merchants' Bank of South Carolina at Cheraw, some time previous to the said first day of December, A. D. 1869, failed to pay their bills of credit, known as bank bills, and continued so to fail to pay their bills of credit up to the said first day of December, A. D. 1869; and that subsequently, on the day of , A. D. 18 , in accordance with the provisions of the said act last mentioned, William Godfrey was, by an order made by the honorable , circuit judge of the circuit, duly appointed receiver of the property and assetts of the said bank, and there-
11 after, and before the commencement of this action, he gave his bond as required by said order as such receiver, and took charge of the assetts of the said bank.

And your orator further shows unto your honors that of the said bills of credit of the said bank, or promissory notes, payable on demand to bearer, and constituting a portion of the circulating medium intended to be furnished by the said bank in accordance with its charter, a large amount in the regular course of trade, and for valuable consideration, came to your orator, to wit, the amount of eighteen thousand four hundred and sixty dollars, which said bills are the property of your orator, and set forth as to dates and amounts in a schedule hereunto annexed, marked "Exhibit B" and prayed to be taken as a part of this bill, and now in the hands of the solicitors of your orator and ready to be produced when required, in virtue whereof your orators are entitled to have of the assetts of the said bank, if they be sufficient to discharge all its debts and liabilities, payment in full as well of the principal as of
12 interest; and if the said assetts are not sufficient, the proportion to which, on a division of the same to all the bill-holders and creditors, your orator may be entitled; and in virtue whereof your orator is also entitled to payment of his debt out of the property of the various persons mentioned in the list appended and marked "Exhibit A," on their liability as stockholders of the said bank at the time of its failure, or as persons interested therein, at any time within twelve months previous to said failure, according to the provisions of the act of the general assembly of the said State aforesaid.

That for the reasons and facts aforesaid your orator charges: That he is entitled to have an account of the assetts of the said bank, and that the same shall be marshalled under the directions and decree of this honorable court, and applied to the discharge of the claims of your orator and other just creditors of the aforesaid bank, and that your orator is entitled to pursue on the equity side of this court the said stock-
13 holders; that your orator is entitled to a full discovery of the facts as charged, and that he is entitled to a full payment of his claim

against the said bank out of the property of the said stockholders of the said bank upon their liability under the provisions of the said charter, and the act of the general assembly amending the same. In tender consideration whereof, and forasmuch as your orator is remediless in the premises by the strict rules of the common law, and can only have adequate relief in a court of equity, where matters of this nature are properly cognizable and relievable:

To the end, therefore, that the said William Godfrey, receiver of the Merchants' Bank of South Carolina at Cheraw, late president of the said bank; and John F. Mathesson, cashier; George W. McIver and Henry McIver, Allan McFarlan, Alexander McQueen, Caleb Coker, and John F. Mathesson, directors of the said bank, and H. D. Alexander, J. D. Aiken, R. J. Barrett, J. W. Rum, James Campbell, C. Coker, L. M. Coker, A. D. Chapman, A. B. Davidson, John Fraser and Company, E. A. Gregg, W. Godfrey, R. M. Johnston, O. H. Kollock, R.
14 Lathers, J. P. Little, B. F. Little, Mary Little, Ann Little, Thomas S. Little; G. W. Little, trustee; J. H. Hardee, guardian; L. D. Bennett, H. T. Peak, A. B. Springs, R. C. Springs, F. Steele, F. N. Sharbuck, J. Sparks, J. D. Wilson, J. J. Wilson; S. L. W. Wallace, trustee; S. L. W. Wallace, executor; T. P. Lide, J. F. Ledbetter, P. B. Lalbarre, J. C. Lyons, A. McFarlan, Jarret McFarlan, C. T. McFarlan, Miss Janet McFarlan, A. McQueen, J. F. Mathesson, A. Malloy, R. A. Springs, D. Malloy, M. S. McCall, W. R. Myers, J. P. McCall, H. McIver, G. W. McIver, J. H. McIver, M. S. Martin; M. S. Martin, trustee; T. E. B. Peguy, T. C. Preleau, P. Price, Merchants' Bank of South Carolina, George A. Trenholm, Theodore D. Wagner, Charles K. Prioleau, James T. Welsman, William L. Trenholm, late copartners, doing business under the name and style of John Fraser and Company, stockholders in the said bank, may, if they can, show why your orator should not have the relief hereby prayed, and they may upon their several and respective corporal oaths, and according to the best of their knowledge and belief,
15 true, direct, and perfect answer make to the several int errogatories hereinafter mentioned and set forth; that is to say, whether the said bank was not chartered as aforesaid; whether it did not become organized and act upon the liberties and franchises of said charter until its failure aforesaid; whether it did not issue bills of credit or promissory notes, payable on demand to bearer, to a large amount; whether on the first day of March, A. D. 1865, the said bank was not indebted to an amount far exceeding its assetts, and whether it had not at that date failed; whether the said bank, some time previous to the first day of December, A. D. 1869, had not failed to pay their bills of credit, and whether the said bank did not continue so to fail to pay the said bills up to the first day of December, A. D. 1869; whether subsequently, on the day of , A. D. 1870, William Godfrey was not appointed by the honorable circuit judge of the circuit, receiver of the property and assetts of the said bank, and whether the said William Grodfrey did not under the said order take charge
16 of the assetts of the said bank as receiver as aforesaid; whether the appended list, marked "Exhibit A," is a true and correct list of the officers and stockholders of the said bank, and whether said list correctly discloses the respective quota of shares of the said stockholders as per Exhibit A. If not, state in what particulars, to your knowledge, the said list is incorrect; and also who are the stockholders, and what are their respective quotas of the capital stock of the said bank.

That an account may be taken by and under the direction of this honorable court of the claim of your orator, and of all other debts due

by the said bank and remaining unpaid; and that all and singular the billholders and creditors of the said bank may be summoned and notified by the order of this honorable court to come forward according to the course and practice of this court to establish the claim due by the said bank to them.

17 And that an account may be taken of the assetts of the said bank, and that the same may be administered by this honorable court and applied to the payment in due course of law of the billholders and other creditors of the said bank who may come in and contribute to the expense of this suit. And that this honorable court may grant a decree or decrees against each and every one of the stockholders of the said bank in such form and to such extent as to this court may seem meet and proper; and your orator may have such other and general relief as to this honorable court, on a full hearing, may seem proper.

May it please your honors to grant unto your orator the most gracious writ of subpœna of the United States of America to be directed to the said William Godfrey, receiver, late president of the said bank, and to John Mathesson, cashier of said bank, and to George W. McIver, Henry McIver, Allan McFarlan, Alexander McQueen, John F. Mathesson, directors, and B. W. Edwards, James L. Coker, W. C. Coker, executors

18 of the last will and testament of Caleb Coker, deceased, late director of said bank, and to H. D. Alexander, J. D. Aiken, R. J. Barrett, J. W. Rum, James Campbell, C. Coker, L. M. Coker, A. D. Chapman, A. B. Davidson, and to George A. Trenholm, Theodore D. Wagner, Charles K. Prioleau, James T. Welsman, William L. Trenholm, late copartners doing business under the name and style of John Fraser and Company; E. A. Gregg, W. Godfrey, R. M. Johnston, A. S. Johnston, O. H. Kollock, R. Lathers, J. P. Little, B. F. Little, Mary Little, Ann Little, Thomas S. Little; G. W. Little, trustee; J. H. Hardee, guardian; L. D. Bennett, H. T. Peake, A. B. Springs, R. C. Springs, F. Steele, F. N. Sharbuck, J. Sparks, J. D. Wilson, J. J. Wilson; S. L. W. Wallace, trustee; S. L. W. Wallace, executor; T. P. Lide, J. F. Ledbetter, P. B. Labatre, J. C. Lyons, A. McFarlan, Janet McFarlan, C. T. McFarlan, Miss Janet McFarlan, A. McQueen, J. F. Mathesson, A. Malloy, R. A. Springs, D. Malloy, M. S. McCall, W. R. Myers, J. P. McCall, H. McIver, G. W. McIver, J. H. McIver, M. S. Martin; M. S. Martin trustee;

19 T. E. B. Peguy, T. C. Preleau, P. Price, Merchants' Bank of South Carolina stockholders, and to the other stockholders in the said bank, when they shall be discovered, thereby commanding them and every of them at a certain day, and under a certain pain therein to be specified, personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet; and your orator will ever pray.

CHAMBERLAIN, SEABROOK & DUNBAR,
Solicitors for Complainant.

THE STATE OF SOUTH CAROLINA,
Richland County:

E. B. Seabrook, being duly sworn, says he is of counsel for the complainant in this action; that the foregoing complaint is true of his own knowledge except as to those matters stated on information and belief, and as to those matters he believes it to be true. Deponent further says

against the said bank out of the property of the said stockholders of the said bank upon their liability under the provisions of the said charter, and the act of the general assembly amending the same. In tender consideration whereof, and forasmuch as your orator is remediless in the premises by the strict rules of the common law, and can only have adequate relief in a court of equity, where matters of this nature are properly cognizable and relievable:

To the end, therefore, that the said William Godfrey, receiver of the Merchants' Bank of South Carolina at Cheraw, late president of the said bank; and John F. Mathesson, cashier; George W. McIver and Henry McIver, Allan McFarlan, Alexander McQueen, Caleb Coker, and John F. Mathesson, directors of the said bank, and H. D. Alexander, J. D. Aiken, R. J. Barrett, J. W. Rum, James Campbell, C. Coker, L. M. Coker, A. D. Chapman, A. B. Davidson, John Fraser and Company,
E. A. Gregg, W. Godfrey, R. M. Johnston, O. H. Kollock, R.
14 Lathers, J. P. Little, B. F. Little, Mary Little, Ann Little, Thomas S. Little; G. W. Little, trustee; J. H. Hardee, guardian; L. D. Bennett, H. T. Peak, A. B. Springs, R. C. Springs, F. Steele, F. N. Sharbuck, J. Sparks, J. D. Wilson, J. J. Wilson; S. L. W. Wallace, trustee; S. L. W. Wallace, executor; T. P. Lide, J. F. Ledbetter, P. B. Lalbarre, J. C. Lyons, A. McFarlan, Jarret McFarlan, C. T. McFarlan, Miss Janet McFarlan, A. McQueen, J. F. Mathesson, A. Malloy, R. A. Springs, D. Malloy, M. S. McCall, W. R. Myers, J. P. McCall, H. McIver, G. W. McIver, J. H. McIver, M. S. Martin; M. S. Martin, trustee; T. E. B. Peguy, T. C. Preleau, P. Price, Merchants' Bank of South Carolina, George A. Trenholm, Theodore D. Wagner, Charles K. Prioleau, James T. Welsman, William L. Trenholm, late copartners, doing business under the name and style of John Fraser and Company, stockholders in the said bank, may, if they can, show why your orator should not have the relief hereby prayed, and they may upon their several and respective corporal
oaths, and according to the best of their knowledge and belief,
15 true, direct, and perfect answer make to the several int errogatories hereinafter mentioned and set forth; that is to say, whether the said bank was not chartered as aforesaid; whether it did not become organized and act upon the liberties and franchises of said charter until its failure aforesaid; whether it did not issue bills of credit or promissory notes, payable on demand to bearer, to a large amount; whether on the first day of March, A. D. 1865, the said bank was not indebted to an amount far exceeding its assetts, and whether it had not at that date failed; whether the said bank, some time previous to the first day of December, A. D. 1869, had not failed to pay their bills of credit, and whether the said bank did not continue so to fail to pay the said bills up to the first day of December, A. D. 1869; whether subsequently, on the day of , A. D. 1870, William Godfrey was not appointed by the honorable circuit judge of the circuit, receiver of the property and assetts of the said bank, and whether the
said William Grodfrey did not under the said order take charge
16 of the assetts of the said bank as receiver as aforesaid; whether the appended list, marked "Exhibit A," is a true and correct list of the officers and stockholders of the said bank, and whether said list correctly discloses the respective quota of shares of the said stockholders as per Exhibit A. If not, state in what particulars, to your knowledge, the said list is incorrect; and also who are the stockholders, and what are their respective quotas of the capital stock of the said bank.

That an account may be taken by and under the direction of this honorable court of the claim of your orator, and of all other debts due

by the said bank and remaining unpaid; and that all and singular the billholders and creditors of the said bank may be summoned and notified by the order of this honorable court to come forward according to the course and practice of this court to establish the claim due by the said bank to them.

And that an account may be taken of the assetts of the said
17 bank, and that the same may be administered by this honorable court and applied to the payment in due course of law of the billholders and other creditors of the said bank who may come in and contribute to the expense of this suit. And that this honorable court may grant a decree or decrees against each and every one of the stockholders of the said bank in such form and to such extent as to this court may seem meet and proper; and your orator may have such other and general relief as to this honorable court, on a full hearing, may seem proper.

May it please your honors to grant unto your orator the most gracious writ of subpœna of the United States of America to be directed to the said William Godfrey, receiver, late president of the said bank, and to John Mathesson, cashier of said bank, and to George W. McIver, Henry McIver, Allan McFarlan, Alexander McQueen, John F. Mathesson, directors, and B. W. Edwards, James L. Coker, W. C. Coker, executors of the last will and testament of Caleb Coker, deceased, late di-
18 rector of said bank, and to H. D. Alexander, J. D. Aiken, R. J. Barrett, J. W. Rum, James Campbell, C. Coker, L. M. Coker, A. D. Chapman, A. B. Davidson, and to George A. Trenholm, Theodore D. Wagner, Charles K. Prioleau, James T. Welsman, William L. Trenholm, late copartners doing business under the name and style of John Fraser and Company; E. A. Gregg, W. Godfrey, R. M. Johnston, A. S. Johnston, O. H. Kollock, R. Lathers, J. P. Little, B. F. Little, Mary Little, Ann Little, Thomas S. Little; G. W. Little, trustee; J. H. Hardee, guardian; L. D. Bennett, H. T. Peake, A. B. Springs, R. C. Springs, F. Steele, F. N. Sharbuck, J. Sparks, J. D. Wilson, J. J. Wilson; S. L. W. Wallace, trustee; S. L. W. Wallace, executor; T. P. Lide, J. F. Ledbetter, P. B. Labatre, J. C. Lyons, A. McFarlan, Janet McFarlan, C. T. McFarlan, Miss Janet McFarlan, A. McQueen, J. F. Mathesson, A. Malloy, R. A. Springs, D. Malloy, M. S. McCall, W. R. Myers, J. P. McCall, H. McIver, G. W. McIver, J. H. McIver, M. S. Martin; M. S. Martin trustee;
T. E. B. Peguy, T. C. Preleau, P. Price, Merchants' Bank of South
19 Carolina stockholders, and to the other stockholders in the said bank, when they shall be discovered, thereby commanding them and every of them at a certain day, and under a certain pain therein to be specified, personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet; and your orator will ever pray.

CHAMBERLAIN, SEABROOK & DUNBAR,
Solicitors for Complainant.

THE STATE OF SOUTH CAROLINA,
Richland County:

E. B. Seabrook, being duly sworn, says he is of counsel for the complainant in this action; that the foregoing complaint is true of his own knowledge except as to those matters stated on information and belief, and as to those matters he believes it to be true. Deponent further says

that the reason the verification is not made by said complainant is that he is not within the State.

E. B. SEABROOK.

20 Sworn to before me this second of December, 1870.

N. J. CALNAN,
Notary Public.

The following are exhibits to the bill:

EXHIBIT A.

List of stockholders of Merchants' Bank of South Carolina at Cheraw, So. Ca., as furnished by W. Godfrey, esqr., Aug. 8th, 1870.

ASSETS.

Bills of exchange protested	19,091 79
Notes	43,423 66
Bonds of State of So. Ca., (repudiated)	48,830 "
Confederate bonds	464,700 "
Real estate, cost $3,600, value	100 "

LIST OF STOCKHOLDERS.

H. D. Alexander	36	shares
J. D. Aiken	50	"
R. J. Barrett	84	"
J. W. Rum	20	"
Ja's Campbell	64	"
C. Coker	6	"
L. M. Coker	15	"
A. D. Chapman	22	"
A. B. Davidson	60	"
Jno. Fraser & Co	30	"
21 E. A. Gregg	30	"
W. Godfrey	1	"
R. M. Johnston	200	"
A. S. Johnston	16	"
O. H. Kollock	4	"
R. Lathers	200	"
J. P. Little, Anson Co., No. Ca	158	"
Brought over	996	"
B. F. Little, Anson Co., N. C	110	"
Mary Little	20	"
Ann Little	20	"
Tho's S. Little	5	"
G. W. Little, trustee	5	"
J. H. Hardee, guardian	64	"
L. D. Bennett	20	"
H. T. Peake	4	"
A. B. Springs	60	"
R. C. Springs	60	"
F. Steele	13	"
F. N. Sharbuck	40	"

J. Sparks	200	shares
J. D. Wilson	14	"
J. J. Wilson	10	"
S. L. W. Wallace, trustee	90	"
S. L. W. Wallace, executor	44	"
T. P. Lide	7	"
J. F. Ledbetter	43	"
P. B. Labarre	20	"
22 J. C. Lyons	50	"
A. McFarlan	4	"
Janet McFarlan	60	"
C. T. McFarlan	60	"
Miss Janet McFarlan	71	"
A. McQueen	90	"
J. F. Mathesson	50	"
A. Malloy	100	"
R. A. Springs	60	"
Brought over	2,390	"
D. Malloy	20	"
M. S. McCall	45	"
W. R. Myers	60	"
J. P. McCall	40	"
H. McIver	20	"
G. W. McIver	80	"
J. H. McIver	5	"
M. S. Martin	50	"
M. S. Martin, trustee	100	"
T. E. B. Peguy	300	"
T. C. Preleau	6	"
P. Price	50	"
Merchants' Bank of So. Ca	834	"
	4,000	"

CHERAW, S. C., *August 8th*, 1870.

23 *Directors of Merchants' Bank of South Carolina at Cheraw, S. C., as far as ascertained, as follows:*

William Godfrey, president, now receiver	1	shares
George W. McIver	80	"
Henry McIver	20	"
Allan McFarlan	4	"
Alex'd'r McQueen	90	"
Caleb Coker, (dec.)	6	"
Jno. F. Mathesson	50	"
	251	

B. W. Edwards, Ja's L. Coker, W. C. Coker, executors of Caleb Coker, dec'd.

Cashier Merchants' Bank at Cheraw, So. Ca.

John F. Mathesson, esq.:

Am't of bank-notes protested April 12th, 1870	5,775
Am't of bank-notes protested August 3rd, 1870	10,225
Whole am't of notes	$16,000

24 EXHIBIT B.

Merchants' Bank of South Carolina, Cheraw.

21 $5 bills: Nos. 827, 496, 416, 365, 859, 780, 603, 82, 746, 268, 165, 545, 802, 224, 480, 58, 288, 111, 826, 556, 464	$105
2 $10 bills, Nos. 140 & 171	20
1 $20 " No. 36	20
	145

165 $5 bills: Nos. 768, 487, 206, 625, 363, 964, 937, 643, 575, 673, 368, 153, 232, 307, 980, 300, 749, 962, 806, 987, 193, 348, 142, 322, 778, 149, 382, 58, 968, 174, 353, 752, 578, 689, 3, 573, 401, 919, 658, 476, 764, 277, 834, 148, 71, 163, 136, 529, 720, 155, 816, 393, 629, 105, 808, 514, 732, 9, 558, 257, 851, 468, 56, 379, 714, 615, 312, 41, 888, 680, 167, 213, 66, 206, 4, 935, 721, 917, 49, 634, 204, 872, 63, 197, 269, 666, 193, 482, 929, 138, 348, 133, 61, 463, 328, 995, 755, 217, 712, 366, 824, 526, 773, 796, 494, 3, 929, 861, 980, 956, 449, 641, 792, 82, 773, 487, 470, 218, 858, 113, 804, 670, 340, 76, 469, 579, 979, 874, 980, 447, 385, 347, 227, 703, 148, 224, 966, 177, 548, 561, 845, 866, 942, 549, 595, 33, 755, 405, 798, 594, 592, 810, 886, 660, 155, 992, 386, 168, 573, 123, 471, 785, 40, 681, 318	825

25 1 $50 bill: No. 143	$50
2 $20 bills: Nos. 46 & 190	$40
17 $10 bills: Nos. 187 A, 163 A, 189 B, 114, 132, 315, 103, 380, 189 A, 187 A, 83, 320, 163 B, 162 B, 8, 117, 139	170
	$269

3 $20 bills: Nos. 175, 169, 105	$60
1 $10 bills, No. 347 A	10
35 $5 bills: Nos. 964 D, 720 A, 674 B, 961 C, 374 A, 436 A, 400 D, 1000 C, 833 A, 619 B, 627 A, 462 A, 181 D, 131 B, 879 B, 369 B, 376 D, 687 B, 996 A, 891 A, 801 D, 1 B, 755 B, 369 A, 73 B, 776 D, 898 A, 418 D, 583 C, 451 A, 611 A, 985 D, 353 B, 192 A, 789 B	175
	$245

8 $20 bills: Nos. 120 A, 73 A, 83 A, 47 A, 40 A, 69 A, 29 A, 157 A	$160
13 $10 bills: Nos. 29 B, 82 A, 372 B, 58 B, 78 A, 14 A, 168 B, 213 B, 328 B, 211 B, 279 B, 275 B, 230 B	130
$5 bills: Nos. 371 A, 905 D, 126 D, 563 C, 259 A, 330 D, 222 A, 881 B, 896 D, 210 A, 377 C, 513 A, 846 B, 232 B, 79 D, 354 D, 938 A, 32 D, 174 C, 139 B, 933 D, 759 B, 378 B, 660 C, 426 B, 179 D, 403 D, 287 B, 941 C, 130 C, 63 B, 316 A, 870 A, 636 D, N, 766 D, 559 C, 876 B, 359 D, 93 B, 538 D, 790 A, 815 D, 847 C, 124 B, 900 B, 305 C, 381 A, 332 D, 106 B, 483 D, 718 A, 134 B, 334 A, 265 D, 742 A, 850 B, 177 B, 719 A, 529 A, 393 B, 581 A, 858 B, 315 A, 87 B, 238 C, 952 A, 440 B, 105 D,	

235 D, 303 B, 30 C, 171 D, 15 C, 844 D, 217 D, 993 C, 496 D, 523 B, 898 C, 200 B, 819 D, 378 A, 624 A, 63 A, 905 A, 276 A, 328 C, 368 B, 928 B, 708 B, 934 A, 334 B, 152 A, 764 A, 457 B, 928 B, 291 C, 8 D, 107 D, 231 D, 924 A, 960 D, 867 D, 654 D, 138 D, 45 C, 225 D, 117 C, 967 C, 969 D, 185 A, 848 A, 263 A, 530 C, 686 C, 606 D, 371 B, 17 B, 434 D, 94 B, 669 D, 973 C, 419 C, 686 D, 93 A, 444 D, 637 A, 710 D, 738 D,
26 138 D, 709 C, 690 C, 451 B, 753 B, 427 C, 322 B, 306 A, 488 B, 844 D, 492 D, 656 A $710

$1,000

In p'k'ge No. 1 $2,330+145 ..... $2,475

In p'k'ge No. 2 $5,765, viz:

3 $50 bills: Nos. 44 A, 186 A, 182 A $150

38 $20 bills: Nos. 124 A, 74 A, 156 A, 55 A, 10 A, 13 A, 103 A, 147 A, 126 A, 187 B, 131 A, 76 A, 16 A, 87 A, 149 A, 42 A, 3 A, 86 A, 83 A, 92 A, 42 A, 161 A, 149 A, 116 A, 74 A, 183 A, 29 A, 41 A, 12 A, 15 A, 12 A, 54 A, 40 A, 9 A, 172 A, 128 A, 110 A, 66 A $760

95 $10 bills: Nos. 216 A, 64 B, 136 A, 342 A, 361 B, 10 A, 288 B, 342 B, 286 B, 388 B, 53 A, 183 B, 121 A, 272 A, 71 A, 104 A, 112 A, 255 A, 63 A, 260 B, 191 A, 340 A, 203 B, 375 B, 202 B, 108 A, 104 B, 374 A, 58 A, 359 B, 293 B, 287 A, 300 A, 320 A, 161 B, 202 A, 149 B, 363 A, 212 B, 346 A, 110 B, 71 A, 326 A, 313 B, 126 B, 48 B, 145 B, 328 B, 157 A, 328 B, 31 A, 204 B, 64 B, 151 A, 316 A, 32 A, 387 B, 177 B, 134 B, 253 A, 299 A, 275 A, 343 B, 111 B, 332 B, 225 B, 28 A, 74 B, 269 B, 281 A, 346 B, 113 A, 271 B, 265 A, 317 A, 1 B, 1 B, 31 B, 151 B, 365 A, 27 B, 152 B, 33 A, 92 B, 146 A, 76 B, 275 B, 352 B, 105 A, 79 B, 168 B, 186 B, 11 A, 70 A, 258 B $950

181 $5 bills: Nos. 633 C, 167 D, 28 C, 822 D, 282 B, 747 A, 342 C, 75 D, 232 C, 94 B, 54 C, 833 A, 783 D, 676 C, 760 A, 954 C, 973 C, 412 A, 715 D, 91 D. 518 C, 811 B, 637 B, 885 A, 153 A, 69 B, 267 B, 195 B, 80 C, 920 A, 639 A, 10 C, 271 D, 225 C, 114 B, 324 C, 557 B, 409 D, 428 D, 456 D, 48 A, 319 D, 839 D, 575 D, 910 A, 19 C, 853 B, 876 B, 133 D, 103 A, 378 D, 636 C, 28 A, 255 B, 284 B, 456 D, 209 A, 252 A, 688 B, 771 C, 302 D, 417 D, 832 D, 19 A, 984 C, 938 B, 546 C, 127 C, 102 C, 473 A, 202 C, 20 B, 70 A, 472 A, 638 D, 675 B, 772 B, 76 C, 777 B, 562 D, 752 D, 789 B, 102 D, 321 C, 267 D, 67 D, 528 D, 61 D, 626 B, 644 A, 248 B, 800 C, 393 D, 481 B, 760 C, 891 B, 500 D, 640 A, 226 D, 342 C, 948 A, 606 C, 982 A, 487 D, 64 C, 852 C, 690 A, 121 C, 944 A, 397 B, 908 A, 703 B, 127 B, 820 C, 554 C, 360 C, 567 C, 150 A, 479 B, 499 D, 125 B, 627 C, 690 C, 184 C, 873 B, 85 B, 220 C, 338 C, 122 C, 129 C, 360 A, 579 C, 401 C, 380 A, 855 D, 801 C, 144 C, 283 D, 794 C, 900 A, 998 A,
27 145 A, 467 B, 409 A, 37 A, 955 D, 833 D, 329 D, 59 D, 437 A, 889 A, 271 A, 402 C, 807 C, 566 C, 429 A, 161 B, 237 A, 170 D, 763 D, 379 C, 891 A, 554 D, 552 B, 4 D, 623 D, 853 C, 729 B, 700 C, 241 A, 355 B, 580 C, 124 C, 970 D, 214 B, 598 D, 375 C, 770 D, 985 C, A, 8 B $905

200 $5 bills: Nos. 327 A, 63 A, 507 D, 985 D, 394 A, 598 D, 143 C, 979 B, 763 B, 401 D, 625 B, 823 D, 75 C, 408 A, 51 C, 932 A, 123 A, 179 B, 96 D, 573 B, 782 B, 949 B, 528 D, 74 C, 594 A,

293 C, 863 D, 438 D, 781 B, 724 C, 677 D, 596 D, 174 A, 317 A, 902 A, 976 A, 812 A, 538 D, 448 C, 813 C, 558 A, 623 A, 678 C, 518 A, 982 A, 160 A, 408 C, 154 B, 905 C, 194 C, 602 A, 332 A, 141 A, 682 D, 983, 465 D, 924 A, C, 268 C, 638 C, 113 C, 948 B, 551 D, 699 C, 285 D, 264 B, 435 A, 624 C, 875 A, 211 B, 731 C, 391 C, 817 B, 477 A, 123 A, 755 A, 9 C, 801 D, 717 B, 97 B, 268 A, 962 D, 22 B, 356 D, 912 A, 991 D, 373 C, 329 B, 880 A, 103 C, 295 A, 768 B, 888 C, 728 D, 984 B, 842 B, 999 C, 997 B, 288 C, 968 D, 884 B, 763 A, 327 A, 554 A, 699 B, 557 D, 250 D, 656 B, 529 A, 874 B, 904 C, 581 C, 174 A, 361 C, 28 C, 271 B, 443 A, B, 281 A, 354 A, 950 A, 496 A, 284 B, 2 B, 995 A, 273 B, 259 A, 309 A, 579 C, 314 C, 370 D, 481 B, 799 C, 844 D, 831 B, 588 C, 704 D, 996 C, 868 A, 808 D, 451 B, 936 D, 871 A, 508 A, 497 A, 548 D, 567 B, 59 B, 784 A, 260 D, 136 B, 499 B, 817 B, 673 A, 975 D, 12 A, 76 B, 13 A, 969 A, 392 C, 65 B, 269 B, 938 A, 494 B, 968 B, 799 A, 284 C, 957 B, 499 C, 386 D, 14 D, 198 D, 317 B, 951 A, 948 C, 657 D, 874 A, 523 B, 703 A, 470 D, 403 A, 765 B, 876 C, 329 A, 303 D, 932 D, 157 B, 515 D, 646 C, 869 D, 29 A, 950 B, 674 C, 434 B, 212 C, 977 B, 73 B, 599 D, 815 D, 848 B..... $1 000

200 $5 bills: Nos. 322 B, 954 D, 764 B, 308 A, 739 A, 534 C, 501 A, 632 A, 367 D, 947 A, 412 B, 865 D, 571 C, 803 C, 934 C, 828 A, 568 A, 984 B, 584 A, 797 B, 263 C, 161 D, 977 C, 232 B, 500 D, 501 B, 826 D, 852 C, 929 C, 820 A, 489 B, 491 C, 886 B, 689 B, 478 C, 360 A, 988 D, 128 D, 945 D, 631 C, 911 D, 55 A, 658 B, 527 C, 817 D, 190 D, 535 C, 445 B, 231 D, 360 C, 648 C, 644 D, 944 D, 963 A, 471 B, 142 A, 457 C, 656 C, 847 B, 654 A, 569 D, 998 C, 722 A, 881 D, 475 B, 769 D, 215 B, 652 C, 884 A, 756 D, 479 C, 482 D, 945 D, 599 D, 786 B, 137 C, 229 C, 99 A, 339 D, 231 B, 940 B, 848 A, 680 D, 541 A, 553 C, 113 B, 701 B, 509 D, 971 C, 213 A, 987 B, 686 C, 724 B, 604 A, 713 C, 4 A, 453 B, 758 D, 558 C, 588 D, 821 A, 949 C, 836 D, 141 D, 417 B, 297 C, 477 C, 531 D, 511 A, 66 D, 984 A, 184 C, 862 A, 445 D, 476 B, 438 B, 48 B, 439 28 B, 657 C, 458 C, 538 D, 68 B, 177 C, 35 A, 356 B, 599 C, 592 A, 228 B, 789 B, 641 D, 800 B, 558 B, 65 D, 222 C, 857 D, 963 A, 542 A, 663 C, 236 C, 869 D, 287 A, 981 A, 219 B, 723 B, 234 B, 109 C, 910 D, 39 D, 814 B, 809 B, 9 B, 127 B, 35 B, 896 D, 209 D, 579 B, 431 B, 139 A, 614 B, 759 D, 428 A, 681 B, 322 C, 700 D, 535 C, 409 C, 782 B, 960 B, 350 D, 816 D, 704 D, 692 A, 316 A, 352 D, 448 A, 333 A, 498 A, 572 A, 763 B, 249 B, 97 B, 600 A, 690 D, 611 A, 52 C, 103 C, 796 B, 368 C, 39 C, 388 B, 976 A, 542 B, 740 D, 260 C, 137 B, 113 B, 954 B, 743 C, 642 B, 917 C..... $1,000

200 $5 bills: Nos. 534 C, 894 D, 123 A, 893 B, 261 B, 502 D, 545 A, 973 A, 71 B, 774 C, 14 B, 505 A, 712 D, 380 B, 147 B, 149 A, 62 B, 754 B, 164 D, 241 D, 123 A, 56 C, 953 A, 237 D, 28 C, 80 D, 979 B, 708 B, 670 D, 428 B, 468 B, 484 C, 717 A, 367 A, 403 A, 835 A, 351 A, 575 D, 14 C, 452 C, 80 B, 641 B, 217 C, 129 A, 940 B, 59 D, 373 D, 873 A, 191 A, 500 A, 422 C, 39 B, 977 D, 65 A, 832 C, 327 B, 626 B, 970 D, 563 B, 850 A, 464 D, 982 A, 286 B, 130 A, 693 D, 576 B, 750 C, 475 B, 774 B, 929 B, 520 B, 114 B, 909 D, 890 B, 207 D, 302 C, 492 B, 153 B, 409 D, 854 D, 913 C, 98 A, 65 D, 557 B, 672 B, 527 C, 596 A, 969 D, 533 C, 336 D, 470 D, 982 D, 565 A, 843 C, 477 A,

520 A, 48 C, 894 B, 171 D, 99 D, 621 D, 429 B, 679 D, 685 B, 917 A, 612 D, 135 D, 539 D, 607 D, 238 C, 197 B, 420 B, 655 D, 804 B, 257 D, 784 B, 804 A, 89 C, 621 D, 696 A, 967 B, 735 A, 502 A, 866 C, 253 A, 126 A, 484 D, 376 C, 168 C, 125 A, 167 D, 695 D, 726 C, 500 A, 88 A, 132 C, 769 B, 80 B, 894 A, 314 D, 907 D, 515 D, 542 D, 350 A, 935 B, 341 B, 511 C, 763 D, 721 C, 928 A, 911 C, 759 B, 17 C, 443 A, 744 A, 922 A, 590 B, 476 A, 431 A, 318 A, 391 B, 432 D, 512 A, 888 A, 929 C, 289 A, 351 B, 326 A, 627 C, 452 A, 439 A, 797 A, 527 B, 12 B, 184 C, 42 D, 246 C, 129 B, 289 A, 276 B, 745 B, 804 D, 85 D, 92 A, 634 B, 80 A, 467 A, 824 C, 913 A, 811 C, 406 D, 683 A, 231 C, 603 C, 17 A, 339 B, 273 D, 63 D, 472 B, 485 C..... $1,000

Total in p'k'ge No. 2..... $5,765

29 P'k'ge No. 3 contains:

86 $5 bills: No. 220 B, 261 D, 746 A, 800 A, 483 B, 522 B, 389 D, 445 D, 555 B, 83 C, 866 B, 443 B, 524 C, 358 A, 388 A, 739 B, 746 B, 814 A, 528 C, 885 C, 562 B, 803 A, 522 A, 312 C, 877 A, 605 C, 688 D, 352 B, 13 B, 496 C, 93 A, 699 C, 712 B, 601 C, 808 C, 642 B, 77 A, 88 D, 944 D, 259 C, 751 A, 299 C, 753 C, 996 B, 251 D, 408 A, 167 A, 301 A, 599 A, 461 D, 98 C, 24 C, 592 A, 872 B, 490 D, 649 B, 499 C, 251 A, 118 A, 867 A, 482 C, 695 D, 972 A, 490 B, 960 D, 852 B, 743 A, 194 B, 984 C, 945 C, 823 D, 228 B, 158 B, 239 A, 657 C, 661 A, 563 B, 401 B, 321 B, 457 A, 249 B, 209 B, 52 D, 751 C, 358 B, 419 A..... $430

39 $5 bills: Nos. 544 B, 99 D, 76 A, 554 A, 686 B, 624 D, 732 A, 352 A, 848 D, 495 D, 731 D, 114 D, 748 B, 659 B, 919 C, 388 B, 338 A, 773 A, 603 B, 834 A, 906 A, 379 D, 2 A, 823 A, 693 A, 83 D, 708 C, 243 C, 796 D, 703 B, 174 B, 517 B, 768 A, 395 C, 748 B, 521 D, 329 A, 524 D, 594 D,..... $195

13 $10 bills: Nos. 156 A, 54 B, 65 A, 48 A, 163 B, 363 B, 26 B, 46 A, 87 B, 137 A, 239 B, 199 A, 320 A..... $130

4 $20 bills: Nos. 99 A, 158 A, 100 A, 115 A..... $80

2 $50 bills: Nos. 59 A, 103 A..... $100

83 $5 bills: Nos. 198 C, 701 B, 707 B, 881 B, 347 A, 274 A, 892 C, 595 A, 218 C, 817 D, 801 C, 555 B, 98 A, 584 A, 876 B, 662 A, 889 C, 894 C, 306 C, 155 A, 196 D, 255 C, 403 B, 559 A, 950 C, 369 B, 561 B, 734 D, 385 A, 681 C, 561 C, 158 A, 965 A, 418 D, 891 D, 119 A, 177 D, 659 D, 417 A, 337 C, 433 B, 432 A, 505 A, 294 B, 181 A, 877 B, 398 A, 796 C, 957 C, 623 C, 17 D, 996 A, 768 D, 540 A, 829 C, 505 D, 477 B, 345 B, 423 D, 182 B, 700 A, 700 D, 405 C, 757 D, 476 D, 140 B, 188 A, 996 D, 182 C, 283 C, 14 D, 857 A, 767 C, 96 B, 264 B, 564 C, 557 A, 12 D, 475 A, 264 D, 346 A, 195 B, 819 A..... $415

100 $5 bills: Nos. 106 A, 772 A, 864 D, 771 D, 970 D, 3 B, 336 C, 775 D, 718 B, 330 A, 236 C, 941 B, 791 A, 923 C, 665 A, 157 A, 784 C, 227 B, 343 A, 726 C, 770 A, 388 D, 498 B, 182 D, 114 C, 417 C, 802 D, 928 C, 630 B, 463 A, 787 A, 432 D, 504 A, 298 B, 484 C, 468 B, 861 A, 567 A, 59 D, 44 D, 392 D, 494 C, 122 A, 808 C, 469 D, 293 B, 227 A, 105 C, 54 B, 799 D, 571 B, 634 B, 369 C, 825 B, 920 D, 545 B, 867 D, 9 A,
30 608 A, 246 D, 133 D, 136 A, 778 A, 875 B, 20 A, 375 A, 921 A, 904 B, 26 C, 219 A, 543 B, 869 D, 383 A, 92 A, 629 A, 489 C, 500 A, 753 A, 446 C, 832 B, 512 D, 864 C,

865 D, 147 A, 770 B, 702 C, 700 A, 272 A, 77 B, 482 B, 618 A, 997 B, 4 C, 314 A, 602 C, 878 C, 761 A, 11 B, 42 A, 618 B $500

100 $5 bills: Nos. 306 C, 392 B, 191 D, 364 D, 623 B, 678 B, 513 B, 445 D, 336 B, 954 A, 299 B, 99 D, 487 A, 67 A, 249 A, 893 A, 653 D, 238 D, 735 B, 873 D, 132 B, 149 D, 327 D, 835 B, 300 D, 440 A, 714 C, 640 B, 930 C. 465 D, 173 A, 842 A, 681 D, 201 A, 609 A, 596 A, 811 D, 439 A, 732 D, 696 B, 149 D, 758 A, 89 C, 130 D, 278 D, 682 B, 170 C, 69 C, 426 A, 55 A, 502 A, 290 C, 853 A, 478 A, 72 D, 533 B, 688 C, 706 C, 204 D, 830 A, 107 C, 142 D, 123 C, 779 C, 17 D, 556 A, 446 D, 895 C, 478 B, 956 D, 810 C, 299 B, 271 C, 140 D, 26 A, 56 C, 853 A, 445 A, 115 D, 242 A, 883 B, 675 A, 965 C, 571 C, 354 C, 264 B, 452 A, 567 B, 294 B, 180 C, 819 C, 213 A, 206 D, 928 B, 267 D, 705 D, 314 B, 703 A, 935 B, 92 D..... ..... $500

100 $5 bills: Nos. 336 C, 309 A, 764 A, 242 C, 613 B, 846 B, 777 C, 678 A, 787 A, 866 B, 224 A, 840 B, 4 D, 113 B, 540 A, 169 B, 465 B, 389 B, 725 B, 928 B, 434 B, 585 D, 662 A, 867 C, 669 C, 85 A, 423 D, 58 B, 527 A, 225 A, 223 A, 448 D, 648 A, 707 A, 574 A, 650 B, 638 B, 529 D, 52 B, 844 D, 1000 B, 2 C, 170 A, 947 C, 766 D, 318 D, 243 D, 451 A, 183 A, 350 C, 753 C, 604 C, 526 B, 345 B, 883 B, 109 A, 182 D, 636 D, 338 D, 40 C, 864 D, 982 A, 518 B, 279 B, 10 C, 728 A, 383 B, 264 B, 651 C, 474 D, 943 A, 281 D, 560 C, 600 B, 823 A, 456 C, 805 A, 540 C, 388 A, 370 C, 826 B, 48 D, 170 B, 21 A, 243 B, 271 B, 54 D, 128 C, 858 A, 325 D, 33 C, 302 A, 11 B, 187 B, 781 A, 334 B, 179 C, 218 A, 33 C, 924 C..... $500

100 $5 bills: Nos. 121 A, 718 A, 334 C, 176 A, 950 D, 727 D, 697 A, 876 C, 904 C, 658 D, 494 C, 256 B, 65 C, 842 A, A, 753 A, 980 B, 697 A, 366 B, 294 C, 314 B, 303 D, 226 D, 65 C, 884 A, 959 C, 921 B, 374 D, 391 B, 775 C, 945 D, 469 B, 120 C, 334 A, 433 D, 461 C, 981 B, 852 B, 906 A, 921 A, 408 D, 165 C, 400 D, 701 B, 867 C, 250 D, 276 C, 257 C, 763 A, 121 C, 974 C, 389 C, 446 B, 188 A, 845 D, 950 A, 512 B, 774 C, 789 A, 820 D, 271 C, 821 B, 400 D, 191 A, 439 D, 17 C, 144 A, 163 D, 190 D, 40 A, 164 C, 274 D, 989 B, 168 D, 328 B, 165 D, 323 C, 68 D, 932 D, 584 B, 550 A, 811 C, 797 D, 360 D, 616 C, 626 C, 3 D, 884 B, 482 A, 71 B, 231 D, 510 D, 467 C, 282 D, 63 C, 250 A, 50 D, 640 B, 120 D..... $500

98 $5 bills: Nos. 81 C, 126 B, 712 C, 237 A, 197 C, 68 D, 501 B, 298 C, 232 A, 396 C, 86 A, 17 A, 828 A, 275 C, 673 D,
31 177 C, 855 C, 51 D, 607 D, 397 A, 129 C, 404 D, 14 B, 829 D, 553 D, 76 D, 26 A, 369 A, 887 D, 203 B, 188 D, 361 A, 764 A, 919 B, 50 C, 380 C, 387 C, 446 B, 836 A, 700 D, 697 A, 705 C, 814 D, 461 D, 649 D, 830 A, 261 D, 127 D, 788 B, 636 A, 995 D, 184 B, 846 B, 600 B, 702 B, 886 D, 113 D, 518 D, 904 D, 80 C, 282 C, 639 C, 625 D, 246 D, 940 A, 846 B, 729 C, 783 A, 492 D, 852 A, 142 A, 506 C, 390 C, 357 D, 480 D, 894 A, 159 C, 207 A, 771 D, 989 A, 713 A, 392 C, 816 D, 203 D, 840 B, 924 A, 926 C, 925 B, 41 A, 509 A, 310 B, 465 B, 871 B, 359 B, 246 C, 822 B, 81 B, 880 A..... $490

100 $5 bills: Nos. 572 B, 800 B, 238 B, 664 A, 965 A, 830 B, 105 C, 169 B, 43 C, 406 C, 125 B, 746 C, 17 A, 950 B, 822 B, 110 A, 608 C, 667 D, 950 D, 348 C, 539 B, 679 A, 832 B, 536 A, 960 A, 620 C, 555 D, 148 A, 446 D, 930 D, 567 B, 968 A, 343 B, 586 C, 842 D, 93 B, 552 D, 489 D, 291 D, 138 A, 360 D, 321 C, 29 A, 817 D, 428 C, 145 B, 548 B, 214 C, 115 C, 832 D,

551 C, 358 D, 453 B, 217 D, 412 A, 735 D, 776 A, 771 D, 930 B, 16 D, 262 B, 21 C, 210 C, 885 B, 737 C, 990 B, 601 C, 395 B, 399 B, 163 D, 951 D, 76 A, 95 D, 323 A, 896 B, 157 B, 466 A, 964 D, 704 D, 643 A, 358 B, 671 B, 554 B, 876 B, 829 D, 76 D, 196 C, 394 B, 461 C, 83 C. 88 A, 941 C, 74 A, 290 A, 627 D, 500 A, 130 B, 579 B, 280 B, 50 B..... $500

100 5 bills: Nos. 339 C, 134 C, 499 B, 300 C, 510 B, 73 C, B, 699 A, 934 B, 222 B, 844 A, 650 D, 544 A, 207 C, 701 A, 945 C, 524 B, 525 A, 24 B, 374 C, 361 A, 468 D, 357 A, 49 D, 52 B, 912 A, 479 B, 971 B, 441 A, 826 B, 239 C, 319 B, 604 B, 760 A, 390 B, 589 C, 38 D, 963 C, 419 D, 213 D, 627 D, 208 B, 995 D, 7 D, 81 C, 912 C, 412 D, 359 D, 571 C, 860 B, 235 B, 680 A, 467 D, 817 C, 769 B, 210 B, 213 B, 810 C, 204 A, 377 C, 733 A, 380 D, 67 D, 846 C, 914 B, 114 D, 74 C, 824 A, 193 B, 21 C, 98 B, C, 675 D, 632 D, 656 C, 323 B, 110 D, 356 D, 707 C, 36 B, 925 B, 11 D, 159 D, 123 B, 296 A, 988 A, 799 D, 774 D, 983 A, 506 C, 397 B, 609 B, 30 D, 899 C, 500 B, 734 B, 353 A, 875 A, 494 B..... $500

100 $5 bills: Nos. 390 A, 525 A, 457 B, 728 B, 833 B, 40 B, 411 D, 392 B, 490 C, 714 B, 694 D, 224 C, 427 B, 226 A, 315 D, 818 C, 904 D, 321 D, 711 A, 119 C, 331 D, 538 B, 567 B, 410 D, 835 C, 160 C, 178 A, 302 D, 357 B, 216 B, 260 A, 661 D, 341 B, 204 A, 443 B, 194 A, 617 A, 112 C, 366 B, 806 B, 34 B, 7 C, 410 C, 616 B, 805 A, 954 A, 234 B, 195 A, 759 C, 710 D, 111 A, 662 C, 614 C, 893 A, 27 D, 332 A, 999 C, 468 A, 890 A, 239 C, 76 D, 763 A, 806 C, 56 A, 452 C, 255 C, 441 B, 905 A, 244 B, 10 B, 692 A, 775 D, 902 A, 572 B, 32 134 A, 736 D, 927 C, 639 D, 188 A, 557 A, 297 B, 874 C, 906 A, 922 A, 337 B, 307 D, 847 A, 10 C, 853 C, 115 D, 495 B, 792 B, 467 B, 184 A, 398 B, 843 C, 190 D, 785 B, 585 B, 702 C..... $500

100 $5 bills: 475 C, 117 A, 196 A, 543 A, 713 D, 801 A, 740 D, 816 A, 565 B, 550 A, 771 C, 8 B, 604 B, 699 C, 500 A, 79 A, 507 C, 771 D, 191 A, 243 D, 987 C, 556 A, 903 C, 411 B, 850 D, 579 D, 995 D, 497 B, 879 D, 98 B, 805 B, A, 162 D, 120 A, 897 D, 306 B, 995 A, 77 A, 758 B, 196 B, 65 D, 279 A, 557 A, 196 A, 426 C, 148 A, 380 A, 685 C, 9 A, 105 D, 322 B, 978 C, 731 B, 924 B, 852 C, 726 C, 603 A, 479 B, 79 B, 830 C, 557 C, 523 D, 716 B, 224 B, 893 D, 170 A, 683 B, 135 A, 373 B, 839 B, 108 D, 919 B, 524 D, 907 A, 430 C, 946 A, 680 A, 906 D, 389 C, 345 C, 994 D, 565 C, 541 D, 592 C, 339 A, 779 D, 747 A, 319 A, 257 B, 589 B, 995 D, 116 B, 298 C, 157 C, 155 C, 568 B, 505 C, 345 D, 138 C, 978 B..... $500

114 $10 bills: Nos. 45 A, 219 A, 177 A, 9 B, 318 A, 367 A, 271 B, 54 B, 83 A, 96 A, 265 B, 60 B, 255 A, 266 B, 176 B, 76 B, 125 B, 11 A, 502 A, 282 B, 43 A, 379 D, 355 B, 100 B, 231 B, 63 B, 383 A, 269 A, 63 A, 346 A, 127 B, 277 B, 314 B, 27 B, 170 B, 385 B, 177 A, 229 A, 87 A, 399 B, 365 A, 65 A, 37 A, 226 B, 397 B, 323 B, 357 B, 393 A, 172 A, 245 B, 234 B, 150 A, 134 B, 76 A, 321 A, 91 A, 162 B, 228 B, 319 A, 248 A, 363 A, 273 A, 12 A, 274 B, 49 B, 235 B, 284 B, 167 B, 316 A, 50 B, 138 B, 97 A, 350 B, 350 A, 142 B, 251 A, 111 A, 54 A, 101 A, 247 A, 336 B, 241 A, 278 A, 44 A, 206 B, 47 A, 384 A, 340 A, 65 B, 196 A, 168 A, 225 A, 310 B, 267 B, 246 A, 302 A, 242 B, 96 B, 193 A, 206 B, 338 A, 303 B, 254 B, 142 A, 156 B, 289 A, 72 A, 262 B, 73 A, 76 A, 274 B, 195 D, 384 A, 358 B $1,140

77 $20 bills: Nos. 58 A, 20 A, 107 A, 12 A, 121 A, 138 A, 75 A, 133 A, 174 A, 92 A, 146 A, 182 A, 86 A, 5 A, 1 A, 140 A, 120 A, 141 A, 60 A, 61 A, 196 A, 132 A, 39 A, 104 A, 190 A, 43 A, 25 A, 120 A, 75 A, 21 A, 129 A, 151 A, 14 A, 79 A, 185 A,
33 69 A, 63 A, 197 A, 24 A, 167 A, 173 B, 10 A, 31 A, 123 A, 179 A, 87 A, 39 A, 52 A, 87 A, 67 A, 160 A, 101 A, 40 A, 53 A, 199 A, 186 A, 149 A, 191 , 129 A, 115 A, 97 A, 80 A, 116 A, 70 A, 187 A, 38 A, 83 A, 29 A, 93 A, 17 B, 112 A, 54 A, 163 A, 135 A, 55, 119, 134..... $1,540

34 $50 bills: Nos. 54 A, 73 A, 32 A, 62 A, 130 A, 164 A, 133 A, 154 A, 3 A, 173 A, 89 A, 192 A, 25 A, 133 A, 73 A, 71 A, 69 A, 93 A, 117 A, 134 A, 68 A, 123 A, 189 A, 57 A, 143 A, 120 A, 130 A, 102 A, 55 A, 61 A, 71 A, 79 A, 62 A, 198 A..... $1,700

Total in p'k'ge No. 3 ..... $10,220

Outside.....	$145
No. 1.....	2,330
No. 2.....	5,765
No. 3.....	10,220
Total.....	$18,460

Subpœna.

UNITED STATES OF AMERICA,
Circuit, State of South Carolina:

The President of the United States of America to William Godfrey, lately president, now receiver, of the Merchants' Bank of South Carolina, at Cheraw, George W. McIver, Henry McIver, Allan McFarlan, Alexander McQueen, and John F. Matherson, directors of the said bank, and B. M. Edwards, James L. Coker, and W. C. Coker, executors of the last will and testament of Caleb Coker, deceased, in
34 his life-time a director of the said bank, and John F. Matherson, cashier, and H. D. Alexander, J. D. Aiken, R. I. Barrett, J. W. Rum, James Campbell, C. Coker, L. M. Coker, A. D. Chapman, A. B. Davidson, E. A. Gregg, W. Godfrey, R. M. Johnston, A. L. Johnston, O. H. Kollock, R. Lathers, G. P. Little, B. F. Little, Mary Little, Ann Little, Thomas S. Little, G. W. Little, trustee, G. H. Hardee, guardian, L. D. Bennett, H. T. Peake, A. B. Springs, F. Steele, F. N. Sharbuck, J. Sparks, J. D. Wilson, G. G. Wilson, L. L. W. Wallace, trustee, L. L. Wallace, executor, T. P. Lide, G. F. Ledbetter, P. B. Lalane, G. C. Lyons, A. McFarlan, Jarret McFarlan, senior, C. T. McFarlan, Jarret McFarlan, junior, A. McQueen, J. F. Matherson, A. Malloy, R. A. Springs, D. Malloy, M. S. McCall, W. R. Myers, J. P. McCall, H. McIver, G. W. McIver, J. H. McIver, M. S. Martin, M. S. Martin, trustee, T. E. B. Peguy, T. C. Preleau, P. Price, and George A. Trenholm, Theodore D. Wagner, Charles K. Prioleau, James T. Welsman, and William L. Trenholm, copartners doing business under the name and style of John Fraser & Co., and the Merchants' Bank of South Carolina, at Cheraw, stockholders:

You are hereby strictly commanded and firmly enjoined that, all
35 manner of excuses being laid aside, you be and appear before the judges of the circuit court of the United States for the district of South Carolina, at Charleston, on the first Monday of April next, twenty

days after the service thereof, then and there true and perfect answer to make, upon your corporal oath on the Holy Evangelists, to all such matters as shall be objected against you in the bill of complaint of Harvey Terry. And also that you do, on the rules-day next immediately after the day appointed and expressed, file or cause to be filed, in the registry of said court, your plea, answer, or demurrer to the said bill of complaint.

Hereof fail not, under the pain of one hundred pounds.

Given under the seal of the said court.

Witness the honorable S. P. Chase, Chief-Justice of the United States of America, at Columbia, in South Carolina, district aforesaid, the second day of December, in the year of our Lord one thousand eight hundred and seventy, and in the ninety-fifth year of the sovereignty and Independence of the United States of America.

[SEAL.] CHAMBERLAIN, SEABROOK & DUNBAR,
Complainants' Solicitors.

DAN'L HORLBECK,
C. C. C. U. S. for S. C.

Cir. doc., fol. 24. Dec., 1873.

L. E. JOHNSON, *U. S. M.*

36 *Returns of marshal to service of subpœna writ.*

UNITED STATES MARSHAL'S OFFICE,
SOUTH CAROLINA DISTRICT,
Charleston, 11 *Feb'y*, 1871.

I hereby depute S. D. Shannon, S. D. U. S. M., to execute the within process.

L. E. JOHNSON,
U. S. Marshal.

CHARLESTON, 14*th Feb.*, 1871.

I hereby certify that I executed the within process by personal service on J. D. Aiken, H. D. Alexander, H. T. Peake, W. L. Trenholm, and by leaving at their accustomed place of business a copy of the same for J. T. Welsman, G. A. Trenholm, and Theodore Wagner, on the 13, 14, 15 day of Feb'y, 1871.

S. D. SHANNON,
Special Deputy.

UNITED STATES MARSHAL'S OFFICE,
SOUTH CAROLINA DISTRICT,
Charleston, Feb'y, 187'.

I hereby depute Henry E. P. Sanders, spec. deputy U. S. M., to execute the within process.

L. E. JOHNSON,
U. S. Marshal.

187 .

I hereby certify that I executed the within process by personal service on Henry McIver, H. McIver, Alexander McQueen, A. McQueen, John F. Matherson, William Godfrey, J. H. McIver, L. M. Coker, and
37 J. L. Coker, and by leaving at their residence a copy of the same for J. Sparks, A. D. Chapman, W. C. Coker, J. D. Wilson, and D. Malloy, on the 4th, 6th, 7th, 8th, 9th & 10th days of March, 1871.

HENRY E. P. SANDERS,
Special Deputy.

UNITED STATES MARSHAL'S OFFICE,
SOUTH CAROLINA DISTRICT,
Charleston, Feb'y 8, 1871.

I hereby depute R. L. Hope to execute the within process, subpœnas A. B. Springs, R. A. Springs, F. Steele.

L. E. JOHNSON,
U. S. Marshal.

187 .

I hereby certify that I executed the within process by delivering the summon in person to A. B. Springs, R. A. Springs; F. Steele not to be found. Necessary rideing, 103, 6, 6.18, serving summons. Add what you allow, on the 3 day of March, 1871.

R. L. HOPE,
Special Deputy.

UNITED STATES MARSHAL'S OFFICE,
SOUTH CAROLINA DISTRICT,
Charleston, 14 *April*, 1871.

I hereby depute John A. Jackson, spec. deputy U. S. M., to execute the within process. Service subpœ. on R. M. Johnston.

L. E. JOHNSON,
U. S. Marshal,
Per E. PERRY BUTTS,
Ch'f D'p't.

38 187 .

I hereby certify that I executed the within process by reporting that R. M. Johnston is dead, and I return him as n. e. i., on the day of April, 1871.

JOHN A. JACKSON,
Special Deputy.

UNITED STATES MARSHAL'S OFFICE,
SOUTH CAROLINA DISTRICT,
Charleston, 14 *April*, 1871.

I hereby depute R. L. Hope, spec. dep. U. S. M., to execute the within process.

L. E. JOHNSON,
U. S. Marshal,
By E. P. BUTTS,
Ch'f Dep. Act'g.

187 .

I hereby certify that I executed the within process by—E. A. Gregg not to be found. All information given me is no such a man in York Cou., on the 4 day of May, 1871.

R. E. HOPE,
Special Deputy.

UNITED STATES MARSHAL'S OFFICE,
SOUTH CAROLINA DISTRICT,
Charleston, April 15, 1871.

39 I hereby depute Joseph E. Collins, spec. deputy, to execute the within process.

U. S. Marshal.

187 .

I hereby certify that I executed the within process by serving G. W. McIver, director, & G. W. McIver, personally with a copy of within process, on the 17 day of April, 1871.

J. E. COLLINS,
Special Deputy.

2 services, $4.00.

And on the 31st day of 1871, came into court Richard Lathers, one of the defendants, by his solicitors, Mes's Simonton & Barker, and filed the following answer, which answer is in the words and of the tenor following:

Answer.

UNITED STATES OF AMERICA,
South Carolina District:

The seperate answer of Richard Lathers, named as one of the defendants in the bill of Harvey Terry against William Godfrey, receiver of the Merchants' Bank of South Carolina, at Cheraw, and others.

This defendant, in answer to said bill, says that he has not now
40 and never had any share or shares in said Merchants' Bank of South Carolina, at Cheraw, and that he disclaims all interest in said suit and prays to be hence dismissed, and so forth.

SIMONTON & BARKER,
Defendant's Solicitors.

Before me personally appeared Richard Lathers and on oath says that the above answer is true of his own knowledge.

RICHARD LATHERS.

Sworn to before me this 31st day of March, A. D. 1871.
[L. S.] D. B. GILLILAND,
Not'y Pub.

And on the 3rd day of April, 1871, came into court Henry McIver, J. H. McIver, William Godfrey, C. Coker et al., and G. A. Trenholm et al., by their solicitors, Mess. Simonton & Barker, and Mess. Magrath & Lounde, and filed the following order, which order is in the words and of the tenor following:

Order.

UNITED STATES OF AMERICA,
South Carolina District:

HARVEY TERRY
vs.
WILLIAM GODFREY, RECEIVER, ET AL. } In equity.

41 On motion of Simonton & Barker, solicitors for Henry McIver, J. H. McIver, William Godfrey, C. Coker, and other defendants, and on motion of Magrath & Lounde, solicitors for G. A. Trenholm and other defendants, it is ordered that the complainant do put in security for costs in this case on or before the first day of May next.

It is further ordered that the clerk of this court do inquire and report the amount of security to be given for said costs.

It is further ordered that if the security for costs be not put in on or before the time above stipulated, that the bill be dismissed.

GEO. S. BRYAN,
U. S. Judge, Dist. of So. Ca.

3D APRIL, 1871.

And on the 21st day of April, 1871, came into court the complainant, by his solicitors, Mess'rs Chamberlain, Seabrook, and Dunbar, and filed the following order, which order is in the words and of the tenor following:

Order.

UNITED STATES OF AMERICA,
South Carolina District, 4th Circuit:

HARVEY TERRY
vs.
WILLIAM GODFREY, RECEIVER, ET AL. } In equity.

42 On motion of Chamberlain, Seabrook, and Dunbar, solicitors for complainant, it is ordered that the time fixed in a previous order of this court, of date the third April, A. D. 1871, before which the complainant shall give security for costs, shall be extended from the first day of May, 1871, to the first day of June, 1871.

GEO. S. BRYAN,
U. S. Judge, Dist. of So. Ca., 21st April, 1871.

We consent.

MAGRATH & LOUNDES.
SIMONTON & BARKER.

And on the 20th day of December, 1872, came into court D. H. Chamberlain, and filed the following affidavit, which affidavit is in the words and of the tener following:

Affidavit.

In the circuit court, in equity, Nov. term, 1872.

UNITED STATES OF AMERICA,
Fourth Circuit:

HARVEY TERRY
against
WILLIAM GODFREY, RECEIVER OF THE MERchants' Bank of South Carolina, at Cheraw, et al.

I, D. H. Chamberlain, of counsel for the said complainant, testify and say that no plea, answer, or demurrer to said bill of complaint
43 has been delivered to me by any of the said defendants, or left at my dwelling or place of business, or has otherwise come to my hands or knowledge.

D. H. CHAMBERLAIN.

STATE OF SOUTH CAROLINA,
Richland County:

Personally appeared D. H. Chamberlain, and makes oath that the above affidavit by him subscribed is true.

D. H. CHAMBERLAIN.

Before me this 20th day of Dec., 1872.

ALBERT M. BOOZER,
United States Commissioner, District of S. C.

And on the day of December, 1872, came into court the solicitors for the complainant, and filed the following order to take bill pro confesso and to appoint referee, which order is in the words and of the tenor following:

Order.

Circuit court, in equity, November term, 1872.

UNITED STATES OF AMERICA,
Fourth Circuit:

HARVEY TERRY
vs.
WILLIAM GODFREY, RECEIVER OF THE MERchants' Bank of South Carolina, at Cheraw, et al.

44 This cause came on to be heard at this term in the presence of counsel for the complainant, and whereas no plea, answer, or demurrer has been filed or entered in the said cause to the said bills of complaint by the defendants G. W. McIver, A. B. Springs, R. A. Springs, Henry McIver, Alexander McQueen, John F. Matherson, William Godfrey, receiver, William Godfrey, J. H. McIver, L. M. Coker, J. Sparks, A. D. Chapman, J. D. Wilson, D. Malloy, H. T. Peake, J. D. Aiken, James L. Coker, B. W. Edwards, and W. C. Coker, as executors of the will of C. Coker, and W. L. Trenholm, J. T. Wellsman, G. A. Trenholm, Charles K. Prioleau, and Theodore Wagner, copartners doing business under the name and style of John Fraser and Company, as appears by the affidavit of D. H. Chamberlain, of counsel for the complainant, although each of the said defendants, excepting B. W. Edwards and Charles K. Prioleau, had been served with a subpœna to hear judgment in this cause, as appears by the returns of the marshal of this court, upon reading the *the* complainant's bill and hearing counsel for the complainant, it is hereby ordered that the complainant's bill be
45 taken pro confesso against the said defendants, G. W. McIver, A. B. Springs, R. A. Springs, Henry McIver, Alexander McQueen, John F. Matherson, William Godfrey, receiver, William Godfrey, J. H. McIver, L. M. Coker, J. Sparks, A. D. Chapman, J. D. Wilson, D. Malloy, H. T. Peake, J. D. Aiken, James L. Coker, B. W. Edwards, and W. C. Coker, as executors of C. Coker, deceased, W. L. Trenholm, George A. Trenholm, J. T. Welsman, and Theodore D. Wagner, copartners doing business under the name and style of John Fraser & Co.

And it is further ordered that it be referred to William Seabrook, esquire, who is hereby appointed master pro hac vice in this cause, to inquire and state to the court who were the stockholders of the said bank at the date of the failure thereof, as alleged in the said bill of

complaint, to wit, on the first day of March, in the year of our Lord one thousand eight hundred and sixty-five, or at any time within twelve months previous to the said date, and what were the respective quotas of shares held by all and singular the said stockholders
46 at the said date of failure, or at any time within twelve months previous thereto; and that the said master pro hac vice shall summon all and singular the billholders and creditors of the said bank to be and appear before him on or before a day certain, to be fixed by the said master, and that he shall inquire into and take proof of all and singular the claims of the said billholders and creditors of the said bank; and that the said master shall take an account of the assets of the said bank; and that the said master shall have power to summon before him all persons requisite to the taking of the said account and the discovery of the matters aforesaid, to be examined as the said master shall direct, and to cause the production before him upon oath of all books, papers, and writings relating to the same; that the said master shall be at liberty to make a seperate report as to any of the matters aforesaid, and shall also be at liberty to report from time to time any special circumstance, and the said master shall report his costs and charges to this court.

HUGH L. BOND,
C't Judge.

47 And on the 9th day of April, 1875, came into court the complainant, by his solicitors, Mess'rs Chamberlain, Seabrook & Dunbar, and filed the following order, which order is in the words and o-the tenor following:

Order.

UNITED STATES OF AMERICA,
Fourth Circuit:

In the circuit court, in equity, April term, 1873.

HARVEY TERRY
vs.
WILLIAM GODFREY ET AL. } Order appointing an additional master.

A decree pro confesso having been entered in the above-entitled cause at the November term of this court, 1872, against certain named defendants herein, and a master pro hac vice having been appointed with certain specified duties, it is now, upon good cause shown to this court, ordered that John Bauskett, esq., of Columbia, S. C., be and he is hereby appointed an additional master pro hac vice with the same powers and duties as were and are conferred on the master appointed by the order of this court hereinbefore referred to.

9th April, 1873.

GEO. S. BRYAN,
U. S. Judge Dist. of So. Ca.

48 And on the 22nd day of April, 1873, came into court John Fraser & Co., one of the defendants, by their solicitors, Mess. Magrath & Lounides, and filed the following order, which order is in the words and the tenor following:

Order.

United States circuit court, fourth circuit, So. Ca. district.

HARVEY TERRY
vs.
WILLIAM GODFREY, RECEIVER, ET AL.

On motion of Magrath & Lounde, ordered that the decree pro confesso in this case against John Fraser & Co. be set aside; & that the defendants be allowed to file their answers in the same within two days, & without prejudice to the position of the case on the docket.

GEO. S. BRYAN,
U. S. Judge Dist. of So. Ca.

22d APRIL, 1873.

And on the 22nd day of April, 1873, came into court William
49 Godfrey, receiver, William Godfrey, pres'd't, & other directors, and W. G. McIver, Henry McIver, A. D. Chapman, L. M. Coker, & J. F. Matherson, by their solicitors, Mess. Simonton & Barker, and filed the following order, which order is in the words and of the tener following:

Order.

UNITED STATES OF AMERICA,
District of South Carolina:

HARVEY TERRY
vs.
WILLIAM GODFREY, RECEIVER OF THE MERchants' Bank of So. Ca., at Cheraw, et al.

On motion of Simonton & Barker, for the defendants, William Godfrey, receiver, and for William Godfrey, pres'd't, & other directors of the said bank, and for W. G. McIver, Henry McIver, A. D. Chapman, L. M. Coker, J. F. Matherson, stockholders, it is ordered that the decree pro confesso heretofore made be set aside and that defendants have leave to file their answers, provided that this be done within two
50 days and without prejudice to the position of the cause on the docket, or to any commission already issued.

GEO. S. BRYAN,
U. S. Judge Dist. of So. Ca.

22d APRIL, 1873.

And on the 24th day of April, 1873, came into court the complainant, by his solicitors, Mess. Chamberlain, Seabrook, and Dunbar, and filed the following order, which order is in the words and tener following:

Order.

In the circuit court, 4th circuit, in equity.

UNITED STATES OF AMERICA,
South Carolina District:

HARVEY TERRY
vs.
W'M GODFREY, RECEIVER OF THE MERCHANTS' Bank of South Carolina, et al.

Upon the record in this cause, and upon motion of Chamberlain, Seabrook, and Dunbar, solicitors for the complainant, it is ordered that

the answers filed in this cause under *under* the orders of this court of date of 22d April, 1873, setting aside the order of the previous term, taking the bill in the cause pro confesso against the defendants
51 who had not answered, be stricken out, and that the said defendants have leave to file their answers within one day from the date of this order upon payment of the costs of complainant up to the date of such filing, with the exception of the costs of the special commissioners for taking testimony under the order of Nov. term, 1872, which shall be admitted in the cause, and the costs thereof shall abide the issue of the suit.

HUGH L. BOND, *C't Judge.*

APRIL 24th, 1873.

And on the 26th day of April, 1875, came into court Charles H. Simonton, and filed the following affidavit, which affidavit is in the words and of the tener following:

Affidavit.

STATE OF SOUTH CAROLINA:

Before me personally appeared Charles H. Simonton, who on oath says that in preparing the answer of sundry stockholders of the Merchants' Bank of So. Ca., at Cheraw, he inadvertently omitted the names of the executors of Caleb Coker, and of J. H. McIver; that his
52 firm were regularly retained to appear for this estate and the said J. H. McIver, and to defend them in this suit, and that the copy subpœnas were sent to the said firm with a return within a day or two after they were received. He prays that the estate of Caleb Coker and J. H. McIver may be included among the defendants, for whom by order he has been permitted to answer.

CHARLES H. SIMONTON.

Sworn to this 26 Ap'l, 1873.

DAN'L HORLBECK,
Com. & Cus'cts for S. C.

And on the 26th day of April, 1873, came into court executors of Caleb Coker and J. H. McIver, by their solicitors, Mess. Simonton & Barker, and filed the following order, which order is in the words and of the tener following:

Order.

UNITED STATES OF AMERICA,
District of South Carolina:

HARVEY TERRY
vs.
THE MERCHANTS' BANK OF SO. CA., AT CHERAW.

53 Hearing the affidavit of M'r Simonton, ordered that the defendants, executors of est. C. Coker, and J. H. McIver have leave to join in the answer of the other stockholders, defendants, filed by Simonton & Barker, on the same terms; that the costs of pl'ff to date be paid except costs of the special masters and for the testimony, and that said testimony be used in the cause.

HUGH L. BOND, *C't Judge.*

APRIL 26th, 1873.

And on the 24th day of April, 1875, came into court William Godfrey, receiver of the Merchants' Bank of South Carolina, at Cheraw, by his solicitors, Mess. Simonton & Barker, and filed the following answer, which answer is in the words and of the tener following:

Answer.

UNITED STATES OF AMERICA,
District of South Carolina:

HARVY TERRY
vs.
WILLIAM GODFREY, RECEIVER OF THE MERCHANTS' BANK OF SOUTH CAROLINA, AT CHERAW, et al. } In equity.

54 The separate answer of William Godfrey, receiver of the Merchants' Bank of South Carolina, at Cheraw, to the bill of complaint of Harvey Terry, impleading this defendant with sundry other persons alleged to be directors and stockholders in said bank.

This defendant, making all the usual reservations to the errors and informalities in said bill of complaint contained, for answer thereto saith that he admits all the statement respecting the formation of said bank under the act of the general assembly of this State, and of the renewal of said act from time to time, and that the said corporation did business as a bank, issuing bills and receiving deposits; that this business was conducted for many years before the war, and, as far as it was practicable to do so with an irredeemable and constantly depreciating currency, was continued through the war until some time in 1865, when the bank finally closed its doors; that in his present capacity he says nothing in answer as to the date of the insolvency of the bank, nor as to the stockholders thereof.

55 Further answering, he admits that on the day of 1870, under the order of the hon. Rutland, circuit judge of the circuit, he was appointed receiver of the said bank, and as such receiver took charge of the assets in its possession or custody; that the banking-house and furniture had all been sold out under an execution of this court in McRea vs. the bank, and that the assets thus transferred to him proved to be sixteen thousand and ninety-one $\frac{79}{100}$ dollars in drafts and acceptances; forty-four thousand nine hundred and twenty-one dollars & ninety-one cents ($44,921.91) in personal notes; a judgment against the Cheraw and Coalfield Railroad for some two thousand five hundred dollars; ninety acres of land near Mobile, Alabama; forty-eight thousand eight hundred and thirty dollars in bonds of the State of South Carolina, and four hundred and sixty-four thousand seven hundred dollars in bonds of the Confederate States of America; that as receiver he has been able to collect nothing from these assets, and that there is due to him for expenses incurred in and about the estate
56 in his hands as receiver the sum of twenty-seven $\frac{60}{100}$ dollars; that he is ready at any time to account for his actings and doings as receiver, and prays to be herein dismissed, &c.

SIMONTON & BARKER,
D'f't Sol's.

And on the 24th day of April, 1875, came into court William Godfrey, president, and George McIver, Henry McIver, Alexander McQueen, and John F. Matherson, directors, by their solicitors, Mess. Si-

monton & Barker, and filed the following answer, which answer is in the words and of the tener following:

Answer.

UNITED STATES OF AMERICA,
District of South Carolina:

HARVEY TERRY
vs.
WILLIAM GODFREY, RECEIVER OF THE MERchants' Bank of South Carolina, at Cheraw, et al. } In equity.

The joint and separate answer of William Godfrey, late president,
57 and George McIver, Henry McIver, Alexander McQueen, and John F. Matherson, directors, the last named being lately the cashier of the Merchants' Bank of South Carolina, at Cheraw, to the bill of complaint of Harvey Terry impleading them with other persons alleged to be stockholders of said bank.

These defendants, making all proper reservations to the irregularities and errors in said bill of complaint contained, for answer thereto say that they admit that at one time they were directors of the Merchants' Bank of South Carolina, at Cheraw, and served as such; but that the said bank has long been closed, and by an order of the circuit court of the State of South Carolina is in the hands of a receiver, and their functions as a board of directors has long since ceased. That C. Coker, in his life-time, was a codirector with them, and that Allan McFarlan also was a director, but that the former died before this suit was brought, and that the latter has departed this life since the filing of this bill.

That they admit that the bill sets forth correctly the facts con-
58 nected with the charter of the bank, that it became organized as stated, that it carried on the business of banking under the provision of said charter, that it did issue bills, as all other banks did, and to a large amount.

Further answering, these defendants say that on the first day of March, 1865, the bank was in a peculiar condition. Under the provisions of the act of assembly of the State of South Carolina, passed on the day of , A. D. 1860, the bank had suspended specie payments, and could not in consequence thereof redeem its promises. That during the war, which soon followed, there existed a depreciated currency commonly known as Confederate money, which, under the operation of the laws regulating currency, soon drove out of circulation all the bills of the bank, with those of other banks, and gold and silver ceased altogether to be used as currency or as a measure of value. There were no transactions with the bank but in Confederate money, and on the first of March, 1865, the bank could have met promptly in Confederate money all the transactions made by it for years preceeding, any demands which were likely at that time to be made upon it. When peace
59 was restored, and with it the currency used in the country was destroyed, the bank found itself as unable to meet its notes which were then for the first time presented as it would have been at any time after the act of the legislature respecting specie payments, had any bills been presented for payment.

Further answering, these defendants admit that, in consequence of the failure of the bank to meet its notes, it came within the provisions

of the act of assembly of 13 March, 1869, and on the day of , 1870, it was placed in the hands of a receiver, and that William Godfrey was the receiver appointed, who took charge of the assets of the bank as such receiver.

Further answering, these defendants say that they have seen the list of stockholders appended to the bill as an exhibit, and whilst they observe errors therein as to one or two names, they cannot speak with any certainty as to its *its* correctness. That all the papers and books of the bank are in the hands of a receiver, and out of their possession, and if the stock-book is in existence it must be in his hands. Without
60 this stock-book they cannot answer either as to names of stockholders or the amounts held by each.

Further answering, these defendants say that the assets of the bank consist of a banking-house and furniture, with drafts and bills receivable, and investments in stock and bonds. That the banking-house and furniture were sold under executions against the bank, at the suit of McCrea, issued out of this court, and all the other assets, as they are informed and believe, were passed over to the receiver.

Having fully answered as directors, they ask to be dismissed, &c.

STATE OF SOUTH CAROLINA:

Before me personally appeared George W. McIver, a defendant named herein, who on oath says that the facts of this answer, as far as they come within his knowledge, are true, and so far as they are derived from the information of others he believes them to be true.

GEO. W. McIVER.

Sworn to before me this 23 April, 1873.

CHARLES H. SIMONTON,
Not. Pub.

61 And on the 24th day of April, 1875, came into court Henry McIver, A. D. Chapman, J. F. Matheson, L. M. Coker, W. Godfrey, W. G. McIver, J. H. McIver, and the executors of Caleb Coker, and J. D. Aiken, by their solicitors, Mess. Simonton & Barker, and filed the followiug answer, which answer is in the words and of the tener following:

Answer.

UNITED STATES OF AMERICA,
District of South Carolina:

HARVEY TERRY
vs.
WILLIAM GODFREY, RECEIVER OF THE MERchants' Bank of South Carolina, at Cheraw, et al.

The joint and several answer of Henry McIver, A. D. Chapman, J. F. Mathewson, L. M. Coker, W. Godfrey, W. G. McIver, J. H. McIver, and the executors of Caleb Coker, and J. D. Aikin, defendants, to the bill of complaint of Harvey Terry.

These defendants, saving and reserving to themselves all and all manner of exception to the many errors, informalities, and irregularities in the said bill of complaint contained, for answer thereto, or so

much and such parts thereof as they are advised it is material for them to make answer unto, answering say: They admit that the Merchants' Bank of South Carolina, at Cheraw, was incorporated by the act of assembly of the State of South Carolina, mentioned in the bill, and that the said charter was, from time to time, renewed, as in said bill stated. They also admit that the bank was organized under its charter, and that it did the ordinary business of banking, besides issueing its notes or bank bills, which passed everywhere, and were received as money. They also admit that the bank came within the general provisions of the acts of assembly of the said State with regard to payment of specie by the banks of the State; and they admit that in the act of 1853, in order to secure the persons who, relying on the sanction and authority given by the State to said bank to issue its bills, and to give currency to them as money, and who encouraged by the control which the State reserved to itself over these banks, in order to secure the convertibility of these notes into coin, accepted these notes, the State of South Carolina, in the grant of the renewal of charter made provision for the liability of stockholders in case of the failure of
63 the bank to meet its obligations, for which the State had given currency, and which under the patronage of the State had been accepted as money.

They further admit that the bank carried on business until some time in 1865, when its doors were closed; but in admitting this they by no means admit that the bank was solvent up to the time of its closing. The Merchants' Bank of South Carolina at Cheraw had been in successful business up to the period of the late civil commotion; before the happening of that event it suspended specie payments with the full concurrence and assent of the legislature of the State, to which it owed its creation, and to whom, by the terms of its charter, it was directly responsible. The civil war deranged the whole currency of the country, drove specie and bank-notes from circulation, substituted another and a depreciating currency, disturbed all values, and ended in the destruction of nearly every species of property. The bills of this bank ceased early during the war to pass as money or currency, and just as the war ended they lost altogether the ordinary and general char-
64 acter of a bank-bill, depreciated greatly in value, became articles of commerce and speculation, and did not have or require the safeguards which the State had originally thrown around them in order to keep up their exchangeable character with specie.

Further answering, these defendants say that they do not know what bills of the bank the plaintiff posses'es, or if he possesses any. They do not know when he obtained them, but they deny that he took them when they were freely circulating from hand to hand as money or as a specie circulation, or when there was any likelihood whatsoever that they were redeemable or could ever be redeemed in specie, or until long after they had become mere articles of speculation.

Further answering, these defendants deny that they are liable in any form to the plaintiff by reason of anything he has stated in his complaint. They deny that in the act or acts of the general assembly of the State aforesaid, referred to in said complaint, is any liability created or imposed, except in aid of the public policy of the State in maintaining the full value of bills or notes of a bank or banks while
65 the same are in circulation as money, and so to save from loss all who receive, take, or accept such bills or notes as money, and have given value for such notes and bills as money. That such liability arises, and was intended only to arise, when a bank or banks re-

fuse to redeem the issue of notes and bills in gold or silver coin, and that at such time when the bank so refuses to redeem it fails in its obligation to the State and to those who then are the holders and owners of bills and notes received, taken, or accepted as money. And these defendants deny that the plaintiffs ever received, took, or accepted the bills and notes set forth in the said complaint as the bills and notes of a bank circulating as money, or received, taken, or accepted as representing money; but that, on the contrary, such bills or notes as are set forth in the said complaint as belonging to the plaintiffs, which these defendants deny, were not obtained by the said plaintiffs as bills or notes of a bank circulating as money or representing money, nor by the said plaintiffs ever accepted, taken, or received as such. And these defendants deny that under the act or acts of the general assem-
66 bly of the State is any liability created or imposed, or intended to be created or imposed, for the notes and bills of a bank which have been obtained by purchase or otherwise after such notes and bills have ceased to circulate as money, or are accepted, taken, or received as notes and bills of a bank no longer in circulation as money, and not taken as money or representing money. And these defendants deny that the said plaintiffs as the holders of such bills and notes, if such holders he proves himself to be, which these defendants deny, has cause of action against them, or are entitled to judgment, as asked in the said complaint. Further answering these defendants allege that some time in the year A. D. 1861, the State of South Carolina, by which State the charter of the said bank had been granted, engaged in war with the United States, contrary to and in violation of the obligation of the Constitution of the United States, and so continued until some time then succeeding, and because of the said war much of the property and assets of the said bank became and were wholly lost to the said bank, to its creditors, and stockholders. And these defendants deny that by any act or acts of the general assembly of the said State referred
67 to or set forth in the said complaint was it intended or so to be understood, or can, if so intended or understood, be maintained, that because of or for losses so caused any liability has been created or can be imposed by the State on the shareholders of the said bank.

Further answering, these defendants allege that, besides other losses of the said bank in consequence of the said war, the said bank did sustain and have to bear further loss to a large amount because of the refusal of the said State to pay to the said bank the sum and sums of money for which the said State was lawfully indebted to the said bank, and which sum and sums of money, if so paid by the said State to the said bank, were more than enough to pay and satisfy to the plaintiff the full amount of the said bills and notes of the bank, as set forth in the said complaint; and these defendants deny that by any act or acts of the general assembly of the said State referred to or set forth in the said complaint was it intended, or so to be understood, that because of or for loss so caused by such refusal of the said State any
68 liability has been created or imposed on the stockholders of the said bank.

Further answering, these defendants deny that the plaintiffs received from the said bank, or from any other person or persons, in the course of business or otherwise, any note or notes, bill or bills, of the said bank as money, or in circulation as or representing money, when so received by them.

Further answering, these defendants deny that for bills or notes of the said bank, not received as money, or in circulation as or represent-

ing money when so received, any other or larger amount can be claimed than such as was paid for such bills and notes by the holders and owners thereof, and that such holders and owners are bound to set forth at what time they received such bills and notes, and what consideration passed from them for said bills and notes. For a further defence to the said complaint, these defendants deny that the plaintiffs have any claim against them which is not barred by lapse of time, and such lapse of time they set up in this answer against the claim of the said plaintiffs.

69 For a further defence to the said complaint, these defendants deny that by the act of the general assembly of the said State, passed 20th Dec. 1853, as set forth in the complaint, is a right of action given to any person or persons whomsoever; that these plaintiffs have no right under the said section to institute or maintain this complaint; and that in all cases under the said section, there being no person therein named as entitled to bring suit, the relief sought for under the said section can only be had in the name of the State for the benefit of all parties who may be entitled to relief, or in the name of such person or persons as for that purpose may be specially designated by the State. That therefore these plaintiffs are not entitled to institute or maintain their said complaint, and that the said complaint should be dismissed with the costs of these defendants decreed to be paid to them.

70 For a further defence to the said complaint, the said defendants say that the said bank did some time in the year 1861 lend to the government of the so-called Confederate States its bills and notes that the same might be used in aid of the war then going on between the State of South Carolina with other States, under the name of the Confederate States, and the Government of the United States, and that its bills and notes so lent were so used by the so-called Confederate States; that the issue of the said bills and notes for such purpose was illegal and in violation of the Constitution of the United States, and the said notes and bills thenceforth ceased to be a lawful claim or demand against the said bank, but were thenceforth void and of no value.

For a further defence to the said complaint, the said defendants allege that the bills and notes now set up in the said complaint are a part of the notes and bills so as aforesaid issued by the said bank and lent to the government of the so-called Confederate States for the purpose of giving it aid in the war then carried on by it with the Government of the United States in violation of the Constitution of the United

71 States; that because of the results of the said war much of the assets and property of the said bank became wholly lost to the said bank; that the making of the said loan was publicly known; that the loss of the said bank because of the said loan was as publicly known; and that the said plaintiffs, if they are holders and owners of the notes and bills as set forth in the said complaint, became so with full knowledge of the said loan, of the purposes for which such loan had been made, and of the loss of the said bank because of the result of the said war.

For a further defence of the said complaint, the said defendants allege that the said bank did, during the continuance and progress of the aforesaid war, buy with or exchange for its notes and bills certain so-called public securities, being or professing to be bonds or other so-called evidences of debt of the so-called Confederate States, and that such purchases or exchanges were for large amounts; that the purpose and intent of such purchase or exchange was thereby to afford aid

72 and support to the so-called Confederate States in the aforesaid war with the United States, and such purchase or exchange for

such purpose was wholly illegal, and the making and issueing of such bonds or evidences of debt of the so-called Confederate States was wholly illegal and in open violation of the Constitution of the United States, and such bonds or evidences of debt so issued were altogether void, and the notes and bills of the said bank issued and given for the purchase of or the exchange for such bonds or evidences of debt being so issued and given for an unlawful purpose were also altogether void; that the said plaintiffs, if they are holders and owners of the notes and bills set forth in the said complaint, became so with full knowledge of the purposes for which such bills had been issued and given, and that such bills and notes, if held and owned by the said plaintiffs, are, for the reasons set forth, illegal and void.

73 Further answering, these defendants say that the business of the said bank has always been conducted fairly and honestly, and that its failure is not due to any acts of fraud or misconduct on the part of the bank or its agents; that up to the breaking out of the war it was certainly on a strong basis, and was perfectly solvent, and that its failure is wholly due to the civil war and to the acts of legislation growing out thereof; that the plaintiff cannot take advantage of any provision of the acts of the legislature intended to guard the bona-fide holder of bank-bills taken in course of circulation from negligence, or fraud, or misconduct of the bank or its managers, but not to protect holders of said bills from the acts of God or the enemies of the country.

STATE OF SOUTH CAROLINA:

Before me personally appeared George W. McIver, a defendant named herein, who on oath says that the facts of this answer, so far as they come within his knowledge, are true, and so far as they are derived from the information of others he believes them to be true.

GEO. W. McIVER.

Sworn to before me this 23 April, 1873.

CHARLES H. SIMONTON,
Not. Pub.

74 And on the 24th day of April, 1875, came into court John Fraser & Co., by their attorneys, Mess. Magrath & Loundes, and filed the following answer, which answer is in words and of the tener following:

Answer.

United States circuit court, fourth circuit.

HARVEY TERRY
vs.
WILLIAM GODFREY, RECEIVER OF MERCHANTS' Bank of Cheraw et al.

The defendants, John Fraser & Co., formerly composed of George A. Trenholm, Theodore D. Wagner, James T. Wellsman, William L. Trenholm, who have been served with a subpœna and copy of the bill, their former copartner Charles K. Prioleau not having been served, by Magrath & Loundes, their attorneys, answering the bill herein, say: They deny that the said plaintiff is entitled to have or maintain this bill, and deny that the plaintiff is entitled to have judgment against them as is demanded in the prayer of said bill.

75 For a further answer to the said bill, the said defendants allege that the bills and notes now set up in the said bill are a part of

the notes and bills as aforesaid issued by the said bank, and lent to the government of the so-called Confederate States, for the purpose of giving it aid in the war then carried on by it with the Government of the United States in violation of the Constitution of the United States; that because of the result of the said war much of the assets and property of the said bank became wholly lost to the said bank; that the making of said loan was publicly known; that the loss of the said bank because of the said loan was as publicly known; and that the said plaintiff, if he is holder and owner of the notes and bills as set forth in said bill, became so with full knowledge of the said loan, of the purpose for which said loan had been made, and of the loss of the said bank because of the result of said war.

For a further answer to the said bill, the said defendants allege
76 that the said bank did during the continuance and progress of the aforesaid war buy with or exchange for its notes and bills certain so-called public securities, being or professing to be bonds or other so-called evidences of debt of the so-called Confederate States, and that such purchases or exchanges were for large amounts; that the purpose and intent of such purchase or exchange was thereby to afford aid and support to the so-called Confederate States in the aforesaid war with the United States, and such purchase or exchange for such purpose was wholly illegal, and the making or issuing of such bonds or evidences of debt of the so-called Confederate States was wholly illegal and in open violation of the Constitution of the United States; and such bonds or evidences of debt so issued were altogether void, and the notes and bills of the said bank issued and given for the purchase of or the exchange for such bonds or evidences of debt, being so issued and given for an unlawful purpose, were also altogether void. That the said plaintiff, if he is the holder and owner of the notes and bill set
77 consequences of its conduct.

For a further answer to the said bill, these defendants deny that the plaintiff received from the said bank or from other person or persons, in the course of business or otherwise, any note or notes, bill or bills, of the said bank as money, or in circulation as or representing money when so received by him.

For a further answer to the said bill, these defendants deny that for bills or notes of the said bank, not received as money, or in circulation as representing money when so received, any other or larger amounts can be claimed than such as was paid for such bills and notes by the holders and owners thereof. And that such holders and owners are bound to set forth at what time they received such bills and notes, and what consideration passed from them for said bill and notes.

For a further answer to the said bill, these defendants deny that the plaintiff has any claim against them which is not barred by lapse of time, and such lapse of time they set up in this answer against the claim of the said plaintiff.

78 For a further answer to the said bill, these defendants deny that by any act of the general assembly of said State, as set forth in the said bill, is a right of action given to any person or persons whomsoever; that this plaintiff has no right under any act as set forth in said bill to institute or maintain this action.

For a further answer to said bill, the said defendants say that the said bank did some time in the year 1861 lend to the government of the so-called Confederate States its bills and notes, that the same might be used in the aid of the war then going on between the State of South Carolina and other States under the name of the Confederate States and

the Government of the United States, and that its bills and notes so lent were so used by the so-called Confederate States; that the issue of said bills and notes for such purpose was illegal, and in violation of the Constitution of the United States, and the said notes and bills thenceforth ceased to be a lawful or demand against the said bank, but were
79 thenceforth void and of no value refusal of the said State any liability has been created or imposed on the stockholders of the said bank.

For a further answer to the said bill, these defendants allege that for the purpose of aiding in the prosecution of the war then carried on between the said State and other States and the United States, the general assembly of the said State did, by an act passed 6th February, A. D. 1863, provide that it should be lawful for the banks of the State to purchase bonds and stocks issued by the so-called Confederate Government or any of the States of the Confederate States of America, and did further confirm all such purchases which had been made previously thereto; that by an act of the General Assembly of the said State, passed the 17th December, A. D. 1863, it was further provided, that if any bank shall declare or pay to its stockholders dividends in gold or silver coin, or shall sell or dispose of its gold or silver coin, except to the State or the Confederate States, it should not longer have exemption from proceedings to forfeit its charter. That these several acts of the general assembly of the said State were material alterations
80 of the charter of said bank for purposes illegal and unconstitutional, in manifest violation of the obligation of the State under the Constitution of the United States, not submitted to the stockholders for their acceptance, and were in fact repeal of the provisions of the charter as it had been originally given, and did, in the furtherance of the purposes for which the said acts were passed, force the management of said bank to be in direct violation of its charter, which purposes were wholly illegal and unconstitutional so far as the obligations of the United States do affect the States of this Union, and because of all of which great losses were sustained by the said bank. And these defendants deny that by any act or acts of the general assembly of the said State was it intended or so to be understood, that because of or for loss so caused, any liability has been created or imposed on the shareholders of the said bank, and if so intended or understood, these defendants deny that, because of the action of a State in violation of the Constitution of the United States, can a liability be imposed by it on any of its citizens to answer for the as money, and not taken as money or
81 representing money. And these defendants deny that the said plaintiff, representing the holders of such bills and notes, if such holders they prove themselves to be, which these defendants deny, have cause of action against them or are entitled to judgment as asked in the said bill.

For a further answer to the said bill, these defendants allege that some time in the year A. D. 1861, the State of South Carolina, by which State the charter of the said bank had been granted, engaged in war with the United States, contrary to and in violation of the obligation of the Constitution of the United States, and so continued until some time then succeeding; and because of the said war, much of the property and assets of the said bank became and were wholly lost to the said bank, to its creditors, and stockholders. And these defendants deny that by any act or acts of the general assembly of the said State referred to or
82 set forth in the said bill was it intended or so to be understood, or can, if so intended or understood, be maintained, that because

of or for losses so caused any liability has been created or can be imposed by the State on the shareholders of said bank.

For a further answer to the said bill, these defendants allege that, besides other loses of the said bank in consequence of the said war, the said bank did sustain and have to bear further loss to a large amount because of the refusal of the said State to pay to the said bank the sum and sums of money for which the said State was lawfully indebted to the said bank; and which sum and sums of money, if so paid by the said State to the said bank, were more than enough to pay and satisfy to the plaintiff the full amount of the said bills and notes of the bank as set forth in said bill. And these defendants deny that by any act or acts of the general assembly of the said State referred to or set forth in the said bill, was it intended or so to be understood that because of or for loss so caused by such.

83 For a further answer to the said bill, the said defendants allege that the said plaintiff in said bill has not set forth and charged in the said bill the time of the failure of the said bank in a plain and direct manner, so that these defendant can properly make answer thereto; and that the said plaintiff has not set forth in the said bill a plain and concise statement of the time when the failure of said bank did take place. That the plain and concise manner in which the time of the failure of the bank occurred is a material part of the statement of the cause of action in the said bill; and these defendants say that in this the said bill does not state facts sufficient to constitute a cause of action against these defendants. But for answer, nevertheless, thereto they say that on the thirteenth day of November, A. D. 1860, * * the said bank had then failed, and publicly and notoriously refused to redeem in gold or silver coin its notes and bills which had been issued and put in circulation as money, and so thenceforth continued to refuse to redeem in gold or silver coin its notes and bills which had been issued and put

84 in circulation as money, and has not since then so redeemed its notes and bills. That such refusal, according to the law of the State, made the charter of the said bank subject to forfeiture, and that the State thenceforth only upon certain conditions refrained from enforcing such forfeiture; and the time of such refusal as aforesaid is the time of the failure of the said bank, within the true intent and meaning of the act and acts of the general assembly of the said State set forth or referred to in the said bill. That such and only such is the obligation of the contracts by the charter or the said bank, by which the stockholders of the said bank are bound. And these defendants deny that at such time of the failure of the said bank were they stockholders or shareholders in the said bank. Wherefore they deny that the plaintiff is entitled to have judgment against them, as is asked for in the said bill.

For a further answer to the said bill, these defendants deny that at the time of the failure of the said bank, or within twelve months

85 previous thereto, were they stockholders or shareholders in the said bank, owning or having shares of the capital of said bank.

For a further answer to the said bill, these defendants deny that they are liable to the said plaintiff because of anything contained or set forth in the said bill or in any acts of the general assembly of the said State, as the same is set forth in the said bill.

For a further answer to the said bill, the said defendants deny that they are indebted to the said plaintiff in manner and form, or because of anything set forth in the said bill.

For a further answer to the said bill, these defendants deny that in

the act or acts of the general assembly of the State aforesaid referred to in the said bill is any liability created or imposed, except in aid of the public policy of the State in maintaining the full value of the bills or notes of a bank or banks while the same are in circulation as money, and so to save from loss all who receive, take, or accept such bills or notes as money, and have given value for such notes and bills as
86 money. That such liability arises, and was intended only to arise, when a bank or banks refuse to redeem the issue of notes and bills in gold or silver coin. And that at such time when the bank so refuses to redeem, it fails in its obligation to the State and to those who then are the holders and owners of bills and notes received, taken, or accepted as money. And these defendants deny that the plaintiff ever received, took, or accepted the bills and notes set forth in said bill as the bills and notes of a bank circulating as money, or received, taken, or accepted as representing money; but that, on the contrary, such bills or notes as are set forth in the said bill as belonging to the plaintiff, which these defendants deny were not obtained by the said plaintiff as bills or notes of a bank circulating as money, or representing money, nor by the said plaintiff ever accepted, taken, or received as such. And these defendants deny that under the act or acts of the general assembly of the State is any liability created, or imposed, or intended to be created or imposed, for the notes and bills of a bank which have been obtained by purchase or otherwise after such notes and bills have ceased to circulate as money, or are accepted, taken, or received as notes
87 and bills of a bank no longer in circulation forth in the said bills, became so with full knowledge of the purpose for which such bills had been issued and given; and that such bills and notes, if held and owned by the said plaintiff, are, for the reasons set forth, illegal and void.

Wherefore they pray that the said bill be dismissed as against these defendants, and the prayer of the said plaintiff for judgement against them be refused; and their proper costs and charges by them incurred be paid to them, and such other and further relief as may be proper in the premises.

W. L. TRENHOLM,
MAGRATH & LOUNDES,
Sol'rs fo' John Fraser & Co.

Personally appeared W. L. Trenholm, one of the copartnership formerly existing under the name and style of John Fraser & Co., who, being duly sworn, deposeth that the matters & things in the foregoing answer contained are true so far as stated on his own knowledge, and so far as stated upon information he believes them to be true.

W. L. TRENHOLM.

88 Sworn to before me this 22nd day of April, A. D. 1873.
[SEAL.] A. G. MAGRATH,
Not. Pub.

And on the 27th day of August, 1873, came into court A. Baxter Springs, by his solicitor, J. H. Rion, esq., and filed the following answer; which answer is in the words and tener following:

Answer.

THE UNITED STATES OF AMERICA,
South Carolina District:

Fourth circuit, in equity.

The several answer of A. Baxter Springs, one of the defendants to the bill of complaint of Harvey Terry, a citizen of the State of , complainant against this defendant, and others.

This defendant, now and at all times hereafter saving and reserving to himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for an-
89 swer thereunto, or unto so much and such parts thereof as this defendant is advised is or are material for him to make answer unto, he, this defendant, answering, says:

I. That this defendant adopts as part of his answer the admissions, averments, and defences contained in the answer of such of his codefendants as are similarly situated with himself, in respect to the date and manner of ownership of stock.

II. That this defendant is now the owner of sixty shares of the capital stock of the said Merchants' Bank of South Carolina, at Cheraw; that he became the owner of the said shares of stock in the month of November, one thousand eight hundred and fifty-four; that he has never sold or transferred any shares, and that he has never been the owner of any other shares of the said capital stock of the said Merchants' Bank of South Carolina, at Cheraw, in any capacity whatever.

III. And as to so much of said bill wherein it is claimed that this defendant is liable to the complainant for the bills of the said bank,
90 this defendant, by protestation, not confessing any of the matters in said bill contained to be true, doth plead thereto, and for cause of plea doth say:

1st. That the cause of action stated in the said bill did not accrue within four years before the exhibiting thereof.

2d. That the complainant did not commence his action within six months after the time this defendant became liable to the penalty imposed by the fourth section of the act of the general assembly of the State of South Carolina entitled "An act to recharter the Merchants' Bank of South Carolina, at Cheraw," passed on the 20th day of December, A. D. 1853, if he became liable at all.

3d. That by the eighth section of said act it is provided "that the said bank shall, from and after the first day of February next, [1854,] be subject to the provisions of the act entitled 'An act to provide against the suspension of specie payments by the banks of this State,' ratified on the eighteenth day of December, one thousand eight hundred
91 and forty;" and by the fifth section of the first above mentioned act it is also provided "that it shall not be lawful for the said bank, except in settlement with other banks, to pay or deliver out in payment or satisfaction of any demand upon it, or by way of loan or discount, any bill, note, check, or other paper of any other bank;" that the operation of said eighth and fifth sections was suspended by an act of the aforesaid general assembly passed on the 21st day of December, A. D. 1857, and continued to be suspended by other subsequent acts until the said bank became insolvent and failed, whereby, whatever liability might have been imposed upon this defendant, if any liability was

so imposed, by the fourth section of the first above mentioned act, became and was in law removed and annulled.

4th. That the assets of the said Merchants' Bank of South Carolina, at Cheraw, have not yet been exhausted, nor has their value been ascertained.

5th. That it has not been ascertained what is the amount of the liabilities of the said bank.

92 6th. That on the 13th day of March, A. D. 1869, an act was passed by the general assembly of the State aforesaid, by which it was provided that, unless the said Merchants' Bank of South Carolina, at Cheraw, should, on or before the first day of December, 1869, commence paying their bills of credit, agree to redeem their bills, and in other respects comply with the provisions of the act incorporating the said bank, it, the said bank, should forfeit all corporate rights and privileges. That by said act all acts and parts of acts inconsistent therewith were repealed. That the said Merchants' Bank of South Carolina, at Cheraw, did fail, and has failed, to pay its bills of credit, redeem its bills, and in any respect to comply with the provisions of the act incorporating the bank, before or on the said first day of December, 1869, or ever since. That the said act of the general assembly in no manner or words provided for a continuation of the liability of stockholders of the said bank after the said forfeiture of its corporate rights and privileges.

7th. That, as this defendant has been informed and believes,
93 the said complainant obtained the notes and bills of the said bank now held by him, as he alleges, long after the said notes or bills had ceased to be redeemable for gold and silver, or to be current as money, for a price far below their par value, and probably not exceeding ten cents in the dollar. That the complainant is in no event entitled to recover more than he actually paid for the bank-bills so held by him, with proper interest; and that the complainant, upon producing and making proof of the same, should be required to discover when, from whom, and at what price, the said bank-bills were obtained by him, provided said bills shall be proved to be genuine, lawfully issued, and the complainant the lawful possessor thereof.

IV. Further answering the said bill of complaint, this defendant says that he does not know, nor has he been informed, save by complainant's said bill of complaint, whether the said bank did not refuse, by its president and cashier, to pay the bank-notes enumerated in the
94 Schedule A, annexed to said bill of complaint.

And this defendant denies, and so forth; without this, that there is any other matter, cause, or thing in said complainant's said bill of complaint contained or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

JA'S H. RION,
Defendant's Solicitor.

STATE OF NORTH CAROLINA,
County of Mecklenburg:

A. Baxter Springs, the defendant above named, being duly sworn, says that the matters and things set forth in the foregoing answer are true to

his own knowledge, except as to those matters therein stated on
95 information and belief, and as to those matters he believes it to true.

A. B. SPRINGS.

Sworn to before me this 23d day of August, 1873.

F. W. AHRENS,
U. S. Commissioner.

And on the 30th day of September, 1873, came into court R. A. Springs, by his solicitor, J. H. Rion, and filed the following answer; which answer is in the words and tener following:

Answer.

THE UNITED STATES OF AMERICA,
South Carolina District:

Fourth circuit, in equity.

The several answer of Richard A. Springs, one of the defendants, to the bill of complaint of Harvey Terry, a citizen of the State of , complainant, against this defendant and others.

This defendant, now and at all times hereafter saving and reserving to himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for
96 answer thereunto, or unto so much and such parts thereof as this defendant is advised is or are material for this defendant to make answer unto, he, answering, says:

I. That this defendant adopts as part of his answer the admissions, averments, and defences contained in the answer of such of his codefendants as are similarly situated with himself in respect to the date and manner of ownership of stock.

II. That this defendant is now the owner of sixty shares of the capital stock of the Merchants' Bank of South Carolina, at Cheraw; that he became the owner of the said shares of stock in the month November, one thousand eight hundred and fifty-four; that he has never sold or transferred any shares; and that he has never been the owner of any other shares of the said capital stock of the said Merchants' Bank of South Carolina, at Cheraw, in any capacity whatsoever.

III. And as to so much of said bill wherein it is claimed that this defendant is liable to the complainant for the bills of the said
97 bank, this defendant, by protestation, not confessing any of the matters in said bill contained to be true, doth plead thereto, and for cause of plea doth say:

1st. That the cause of action stated in the said bill did not accrue within four years before the exhibiting thereof.

2d. That the complainant did not commence his action within six months after the time this defendant became liable to the penalty imposed by the fourth section of the act of the general assembly of the State of South Carolina entitled "An act to recharter the Merchants' Bank of South Carolina, at Cheraw," passed on the 20th day of December, A. D. 1853, if he became liable at all.

3d. That by the eighth section of said act it is provided "that the said bank shall from and after the first day of February next [1854] be

subject to the provisions of the act entitled 'An act to provide against the suspension of specie payments by the banks of this State,' ratified on the eighteenth day of December, one thousand eight hundred and forty;" and by the fifth section of the first above mentioned act it
98 is also provided "that it shall not be lawful for the said bank, except in settlement with other banks, to pay or deliver in payment or satisfac of any demand upon it, or by way of loan or discount, any bill, note, check, or other paper of any other bank." That the operation of said eighth and fifth sections was suspended by an act of the aforesaid general assembly passed on the 21st day of December, A. D. 1857, and continued to be suspended by other subsequent acts until the said bank became insolvent and failed, whereby whatever liability might have been imposed upon this defendant, if any liability was so imposed, by the fourth section of the first above mentioned act, became and was in law removed and annulled.

4th. That the assets of the said Merchants' Bank of South Carolina, at Cheraw, have not yet been exhausted, nor has their value been ascertained.

5th. That this defendant hath redeemed and held in his possession for a long time prior to the commencement of this action, and still holds, nine thousand five hundred and fifty dollars of the bills of the said bank.

99 6th. That on the 13th day of March, A. D. 1869, an act was passed by the general assembly of the State aforesaid, by which it was provided that unless the said Merchants' Bank of South Carolina, at Cheraw, should, on or before the first day of December, 1869, commence paying their bills of credit, agree to redeem their bills, and in other respect' comply with the provisions of the act incorporating the said bank, it, the said bank, should forfeit all corporate rights and privileges. That by said act all acts and parts of acts inconsistent therewith were repealed; that the said Merchants' Bank of South Carolina, at Cheraw, did fail and has failed to pay its bills of credit, redeem its bills, and in any respect to comply with the provisions of the act incorporating the bank before or on the said first day of December, 1869, or ever since. That the said act of the general assembly in no manner or words provided for a continuation of the liability of stockholders of the said bank after the said forfeiture of its corporate rights and privileges.

100 7th. That, as this defendant has been informed and believes, the said complainant obtained the notes and bills of the said bank now held by him, as he alleges, long after the said notes or bills had ceased to be redeemable for gold or silver, or to be current as money, for a price far below their par value, and probably not exceeding ten cents in the dollar; that the complainant is in no event entitled to recover more than he actually paid for the bank-bills so held by him, with proper interest, and that the complainant, upon producing and making proof of the same, should be required to discover when, from whom, and at what price the said bank-bills were obtained by him, provided said bills shall be proved to be genuine, lawfully issued, and the complainant the lawful possessor thereof.

IV. Further answering the said bill of complaint, this defendant says that he does not know, nor has he been informed, save by the complainant's said bill of complaint, whether the said bank did not refuse, by its president and cashier, to pay the bank-notes enumerated in the
101 Schedule A annexed to said bill of complaint. And this defendant denies, and so forth; without this, that there is any other matter, cause, or thing in said complainant's said bill of complaint contained ma-

terial or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

JA'S H. RION,
Defendant's Solicitors.

STATE OF NORTH CAROLINA,
County of Mecklenburg:

Richard A. Springs, the defendant above named, being duly sworn, says that the matters and things set forth in the foregoing answer are true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

R. A. SPRINGS.

102 Sworn to before me this 12th day of Sept'b'r, 1873.

F. W. AHRENS,
U. S. Commissioner.

And on the 22nd April, 1873, came into court William Seabrook, special master, and filed the following report; which report is in the words and tener following:

Report.

Fourth circuit of the United States of America, district of South Carolina.

HARVEY TERRY
vs.
WILLIAM GODFREY, RECEIVER OF THE MERchants' Bank of South Carolina, at Cheraw, et al.

To the honorable circuit court of the fourth circuit for the district of South Carolina:

Pursuant to an order of this court in this action, dated the day of , A. D. 1872, whereby it was referred to me, as special master, among other things, to take proof of all and singular the claim of the bill-holders and creditors of said bank on or before a day to be by me fixed, with liberty to make a seperate report as to any matters in
103 said order contained, I respectfully report:

That I caused notice to be published daily in the Charleston News, published in the city of Charleston, and in the Columbia Union, published in the city of Columbia, commencing on the 4th day of April, A. D. 1873, and ending on the 21st day of April, A. D. 1873, requiring all bill-holders and creditors of the said bank to make and prove their claims before me, in the city of Charleston, on or before the said 21st day of April, A. D. 1873.

I further report that the following claims were only made and proved before me within the aforesaid period of time, to wit: W. Gollier, on the

8th inst., proved bills of said bank to the amount of $40, the description whereof is particularly set forth in schedule marked "C." Harvey Terry, on the 11th inst., proved bills as follows, to wit: $5,775 of bills which were duly protested for non-payment on the 28th day of April, A. D. 1870; $10,225 of bills which were duly protested for non-payment on the 3rd day of August, A. D. 1870; $1,245 of bills upon which protest was duly waived on the 3rd day of March, A. D. 1869; &
104 $1,230 of said bills, of all which the description is particularly set forth in schedule marked "B," annexed to the complaint herein; and $5,895 set forth in schedule marked "D."

Archibald King, on the 12th day of April, 1873, proved bills of said bank to the amount of $110, as set forth in schedule marked "E;" Anthony J. Salinas, on the 14th inst., proved of said bills to the amount of $130, as set forth in schedule marked "F;" Andrew Simonds, on the 18th inst., proved bills of said bank to the amount of $55, as set forth in schedule marked "G;" Calvin J. Cowles, on the 19th inst., to the amount of $235, as set forth in schedule marked "H;" and Simonton & Barker, on the 21st inst., proved of said bills to the amount of $26,760, which have been by me sealed up and deposited in the People's National Bank of Charleston, to the order of the clerk of this court. All which is respectfully reported.

WILLIAM SEABROOK,
Special Master.

APRIL 22nd, 1873.

Bills of the Merchants' Bank of South Carolina, at Cheraw, proved on the 8th April, 1873, by H. Gollier.

105 Issued in 1857, denomination $10, No. 64.
" " " $5 " 388, 642, 678, 446, 765.
" in 1859, " " " 800.

$40.

Bills of the Merchants' Bank of South Carolina, at Cheraw, proved at Charleston, by Harvey Terry, complainant, on the 11th day of April, A. D. 1873.

Hundreds: No. 542, issued 2nd Jan'y, 1850—$100.

Fifties: No. 152, issued 4th July, 1857; 17, 9th July, 1857; 158, 10th July, 1857; 185, 16th July, 1857; 122, 15th July, 1857; 61, 19th July, 1857; 192, 20th July, 1857; 182, 25th July, 1857; one mutilated—$450.

Twenties: No. 104, issued 13th Sep'r, 1834; 131, same date; 190, 19th Oct'r, 1835; 40, 21st Oct'r, 1835; 151, 28th Oct'r, 1835; 15, M'ch, 1836; 128, 4th Jan'y, 1847; 143, same date; 74, Sep'r 7th, 1850; 134, Sep'r 13th, 1850; 37, Sep'r 18th, 1850; 101, July 1st, 1857; 25 & 185, July 2nd, 1857; 33 & 26, July 3rd, 1857; 164, 113, 137, 3, 91, 44, July 4th, 1857; 144, 160, 104, & 90, July 5th, 1857; 112, July 6th, 1857; 183, 134, & 63, July 7th, 1857; 85, 100, & 7, July 8th, 1857; 103, July 11th, 1857; 14, July 12th, 857; 30, July 13th, 1857; 78, July 15th, 1857; 165
& 117, July 16th, 1857; 23, July 17th, 1857; 163, July 18th, 1857;
106 108, 38, 45, 43, & 46, July 19th, 1857; 146, July 20th, 1857; 157, 164, 62, 171, & 27, July 21st, 1857; 25 & 31, July 23rd, 1857; 188 & 128, July 24th, 1857; 43 & 157, July 25th, 1857—$1,160.

Tens: No. 190, issued Sep'r 7th, 1834; 171, Sep'r 22d, 1834; 110, Oct'r 19th, 1835; 94, M'ch 3rd, 1837; 109, Sep'r 29th 1850; 200, Oct'r

1st, 1850; 66, Oct'r 9th, 1850; 199, 172, 346, 165, 306, & 353, July 1st, 1857; 373 & 381, July 2nd, 1857; 325, 393, & 242, July 3rd, 1857; 315, 300, & 351, July 4th, 1857; 327, July 5th, 1857; 17, 111, & 95, July 6th, 1857; 349, July 7th, 1857; 9, 330, 146, 209, & 381, July 8th, 1857; 154, 121, 47, 26, & 120, July 9th, 1857; 44, & 222, July 10th, 1857; 177, & 182, July 11th, 1857; 61, 257, & 249, July 13th, 1857; 267, & 311, July 14th, 1857; 332, July 15th, 1857; 146, 339, 72, 150, 144, 124, & 143, July 17th, 1857; 311, 183, & 46, July 18th, 1857; 367, & 180, July 19th, 1857; 121, 316, & 50, July 20th, 1857; 266, 197, 386, 43, 189, 31, & 344, July 21st, 1857; 120, & 207, July 22nd, 1857; 166 & 124, July 23rd, 1867; 47, & 10, July 23rd, 1857; 375, July 24th, 1857; 203, 78, 305, & 232, July 25th, 1857; 79, March 8th, 1837; 208, July 17th, 1857; 165, July 18th, 1857; 60, Feb'y 6th, 1857—$

Fives: No. 684, issued Dec'r 11th, 1834; 381, Jan'y 2nd, 1835; 158, July , 1836; 289, July 6th, 1849; 625, July 10th, 1849; 922, Dec'r 20th, 1849; 848, Jan'y 14th, 1850; 282, Jan'y 15th, 1850; 248, 514, 888,
107 184, 654, 425, 117, 619, 873, 178, 371, 664, 340, 93, & 805, Aug. 1st, 1857; 60, 789, 119, 479, 865, 526, 487, & 529, Aug. 2nd, 1857; 212, 360, 455, 412, 348, 38, 305, 534, & 311, Aug. 3, 1857; 728, 451, 838, 570, 87, 954, 117, 981, & 753, Aug. 4th, 1857; 575, 124, 985, 285, 418, 815, 507, 646, & 42, Aug. 5th, 1857; 847, 724, 573, 463, 15, 749, 511, 274, & 707, Aug. 6th, 1857; 404, 145, 460, 455, 481, & 925, Aug. 7th, 1857; 890, 511, 427, 498, 426, 595, 634, 688, 812, 437, 741, & 399, Aug. 8th, 1857; 573, 646, 663, 221, 110, 456, & 363, Aug. 9th, 1857; 137, 906, 687, 884, 735, & 376, Aug. 10th, 1857; 79, 988, 614, 658, 568, & 65, Aug. 11th, 1857; 48, 727, 266, 454, 758, 913, & 338, Aug. 12th, 1857; 167, 679, 761, 982, 673, 797, 858, 381, 902, & 46, Aug. 13th, 1857; 960, 165, & 69, Aug. 14th, 1857; 800, 905, 973, 480, 959, illegible; 219, 886, 5, 299, 641, & 82, Aug. 15th, 1857; 384, 627, & 583, Aug. 16th, 1857; 718, 364, 840, 824, 219, 504, 667, & 153, Aug. 17th, 1857; 455, 52, 370, 464, 702, 267, & 271, Aug. 18th, 1857; 45, 420, 197, 521, 630, 26, & 447, Aug. 19th, 1857; 430, 662, 293, 807, 828, & 708, Aug. 20th, 1857; 945, 176, 92, 914, 639, 819, & 406, Aug. 21st, 1857; 670, 666, 573, 726, 664, 877, 239, & 572, Aug. 22nd, 1857; 263, 278, 211, 333, 421, 400, 114, 225, 92, 495, 542, 432, & 857, Aug. 23rd, 1857; 945, 916, 74, 331, & 247, Aug. 24th, 1857; 35, 247, 691, 929, 650, 71, 810,
559, 845, 805, 3, 937, & 624, Sep'r 1st, 1857; 58, 109, 715, 217, 384,
108 888, 640, 706, 721, & 79, Sep'r 2nd, 1857; 819, 419, 862, 398, 915, 279, & 679, Sep'r 3rd, 1857; 387, 556, 972, 207, & 136, Sep'r 4th, 1857; 844, 649, 389, 20, 35, 512, 896, & 174, Sep'r 5th, 1857; 237, 771, 687, 262, 65, 267, 896, 943, & 279, Sep'r 6th, 1857; 269, 501, 671, 435, 992, 411, 677, & 780, Sep'r 7th, 1857; 785, 5, 727, 335, 938, 97, & 226, Sep'r 8th, 1857; 320, 556, 390, 591, 641, 931, illegible; 806, & 902, Sep'r 9th, 1857; 148, 95, 367, & 90, Sep'r 10th, 1857; 637, 991, 23, 565, 361, 792, 207, 960, 625, 219, & 863, Sep'r 11th, 1857; 779, 877, 870, 614, 139, & 956, Sep'r 12th, 1857; 502, 119, 222, 218, 414, 940, 74, 694, 285, & 348, Sep'r 13th, 1857; 756, 614, 606, 623, 182, & 453, Sep'r 14th, 1857; 274, 243, 86, 415, 265, 637, 452, 156, 669, & 744, Sep'r 15th, 1857; 835, 249, 908, 147, 680, 480, 790, & 985, Sep'r 16th, 1857; 607, 449, 567, 711, 878, 410, 60, 313, & 526, Sep'r 17th, 1857; 37, 243, 315, 324, 257, 918, 352, 180, & 336, Sep'r 18th, 1857; 374, 134, 333, 391, 782, 911, 947, 727, 513, & 174, Sep'r 19th, 1857; 733, 355, 966, 967, & 12, Sep'r 20th, 1857; 214, 168, 962, 755, 525, 866, 478, 409, & 309, Sep. 21st, 1857; 708, 521, 88, 773, 33, 315, 729, 141, 404, 585, 435, 719, 872, 538, & 495, Sep'r 22nd, 1857; 890, 8, 988, 313, 15, 483, 810, 11, 79, 304, 616, & 339, Sep'r 23rd, 1857; 518, 977, 302, 943, 688, 647, & 686, Sep'r 24th, 1857; 980, 47, & 748, Jan'y 1st, 1858; 167, 859, 705, 845, & 940, Jan'y 2nd, 1858; 206, 271, 869, 436, 561, 562, & 368, Jan'y

3rd, 1858; 310, 207, 627, 237, 735, 711, 423, 394, 931, 575, & 364,
109 Jan'y 4th, 1857; 809, 492, 2, 263, 768, 14, 303, 376, 825, 916, & 697,
Jan'y 5th, 1857; 169, 713, 754, 876, 897, 497, 813, 890, 112, & 750, Jan'y 6th, 1858; 616, 286, 687, 88, 232, 209, 199, 770, 539, 843, 443, 810, 592, 269, 940, & 959, Jan'y 7th, 1858; 766, 135, 382, 617, 272, 45, & 355, Jan'y 8th, 1858; 141, 948, 823, 290, 30, 185, 898, 481, 590, 247, & 582, Jan'y 9th, 1858; 368, Jan'y 10th, 1858; 141, 594, 472, 846, 732, 436, & 926, Jan'y 11th, 1858; 653, 916, 612, 212, 169, 695, & 719, Jan'y 12th, 1858; 756, 355, 110, & 434, Jan'y 13th, 1858; 803, 262, 429, 81, 657, 653, illegible; 421, 707, & 517, Jan'y 14th, 1858; 280, 198, 684, & 773, Jan'y 15th, 1858; 880, 189, 308, 939, 822, 830, 755, 16, & 170, Jan'y 16th, 1858; 927, 158, 650, 725, 502, 342, 277, 550, & 269, Jan'y 17th, 1858; 496, 106, 972, 764, 733, 673, 674, 671, 672, 681, 682, 735, 894, 762, 212, 99, 486, 476, 501, 56, 15, & 852, Jan'y 19th, 1858; 485, 424, 711, 428, 647, 604, 236, 63, & 437, Jan'y 18th, 1859; 662, 190, 765, 297, 556, & 167, Jan'y 20th, 1859; 397, 460, 346, 352, 38, 571, & 850, May 2nd, 1859; 964, 643, 380, 974, 527, 735, & 92, May 3rd, 1859; 247, 616, 93, 165, 964, 746, 843, 151, 644, 856, 33, & 202, May 4th, 1859; 963, 273, 278, 647, 785, 25, 927, 543, 589, 84, 555, & 830, May 5th, 1859; 660, 422, 949, 302, 463, 839, 985, 303, 765, 887, & 620, May 6th, 1859; 600, 830, 259, 47, 843, 253, 688, 404, & 241, May 7th, 1859; 898, 567, 244, 903, 477, 297, 636, 566, & 394, May 8th, 1859; 248, 412, 712, 217, 38, 551, 752, 147, & 117, May 9th, 1859; 226,
110 Sep'r ,1857; 857, May ,1859; 273, date illegible; 886, date illegible; illegible; 415, date illegible; 213, ,1858, illegible; illegible; illegible; 202, Sep'r 10th, 1857; 196, Jan'y 12th, 1858; 640, May 2nd, 1859; 45, Jan'y 9th, 1858; 1, Sep'r 21st, 1857; 68, May 3rd, 1859; 121, Aug. 4th, 1857; 432, Jan'y 11th, 1858.

Archibald King, (Ap'l 12th, 1873.)

$20,	July 12,	1857,	No. 185.
$10,	" 19,	"	" 263.
$5,	Sep'r 2,	"	" 240.
"	Jan'y 17,	1858,	171, 281.
"	Sep. 7,	'57,	926.
"	Sep. 9,	"	750.
"	May 4,	'59,	532.
"	4 Jan'y,	'58,	924.
"	6 "	"	753.
"	2 Aug.,	'57,	448.
"	14 "	"	359.
"	19 Sep.,	"	819.
"	11 Jan'y,	'58,	222.
"	19 Aug.,	'57,	1000.
"	Sep'r 22,	"	240.
"	May 7,	'59,	314.
"	Aug. 5,	'57,	703.

Merchants' Bank of So. Ca., Cheraw.

$10,	July 7,	1857,	# 119.
111 $10,	July 11,	1857,	# 27.
5,	Sept. 18,	"	# 127.
5,	Jan'y 5,	1858,	# 79.
5,	Aug. 7,	1857,	# 49.
5,	Sept. 19,	"	# 268.

5, Aug. 14, " ℔ 839.
5, Sept. 11, " ℔ 203.
5, Aug. 15, " ℔ 246.
5, July 5, " ℔ 34.
5, Aug. 11, " ℔ 307.
5, ℔ 242.
5, Sept. 29, 1857, ℔ 334.
5, Aug. 10, " ℔ 56.
5, Jan'y 21, 1859, ℔ 236.

Held by Anthony J. Salinas, Charleston, S. C.
AP'L 14, 1873.

Cheraw. B.

Merchants' B'k of So. Ca.,						No. 976,	Sept.	5, 1857	5 00
"	"	"	"	"	"	703,	Aug.	5, 1857	5 00
"	"	"	"	"	"	520,	May	5, 1859	5 00
"	"	"	"	"	"	887,	Aug.	15, 1857	5 00
"	"	"	"	"	"	440,	Sept.	6, 1857	5 00
"	"	"	"	"	"	615,	"	2, 1857	5 00
"	"	"	"	"	"	3,	"	17, 1857	5 00
"	"	"	"	"	"	502,	Jan'y	19, 1858	5 00
"	"	"	"	"	"	671,	Aug.	6, 1857	5 00
"	"	"	"	"	"	9,	Feb'y	14, 1857	10 00

112 ANDREW SIMONDS.

AP'L 18TH.

STATE OF N. C.,
County of Mecklenberg, ss:

This day came before me, F. W. Ahrens, U. S. commissioner, Calvin J. Cowles, of the co. and State first above named, and made oath, in due form of law, that he possesses, has, & is the owner of the following-described b'k bills of the Merchants' Bank of Cheraw, S. C., viz:

1 bill,	Aug.	14th,	1857,	861, D	5 00
1 "	Sep.	9,	1857,	195, C	5 00
1 "	Aug.	5,	1857,	263, C	5 00
1 "	May	4,	1859,	267, A	5 00
1 "	Jan.	9,	1858,	907, D	5 00
1 "	"	11,	"	985, C	5 00
1 "	Aug.	14,	1857,	712, C	5 00
1 "	Sep.	17,	1857,	86, B	5 00
1 "	Aug.	8th,	1857,	819, D	5 00
1 "	Sep.	19,	1857,	376, B	5 00
1 "	Aug.	23,	1857,	272, B	5 00
1 "	May	6,	1859,	84, D	5 00
1 "	Aug.	18,	1857,	165, D	5 00
1 "	Aug.	2d,	1857,	241, B	5 00
1 "	Aug.	16,	1857,	947, D	5 00
1 bill,	Jan.	17,	1858,	835, D	5 00
113 1 "	May	8,	1759,	759, A	5 00
1 "	Jan.	19,	1858,	780, B	5 00
1 bill	Jan.	2d,	1858,	496, C	5 00
1 "	Aug.	4,	1857,	939, D	5 00
1 "	Jan.	11,	1858,	569, C	5 00

1	bill, May 5,	1859,	395, D		5 00
1	" Aug. 14th,	1857,	336, C		5 00
1	" Sep. 18th,	1857,	364, C		5 00
1	" Aug. 14,	1857,	247, B		5 00
1	" Aug, 4,	1847,	449, B		5 00
	Amount bro't over				130 00
1	bill, Aug. 9th,	1857,	512, D		5 00
1	" July 7,	1857,	77, A		10 00
1	" July 22,	1857,	358, A		10 00
1	" July 24,	1857,	140, A		10 00
1	" July 21,	1857,	389, A		10 00
1	" July 15,	1857,	139, A		20 00
1	" July 2,	1857,	188, A		20 00
1	" July 6,	1857,	142, A		20 00
	Amounting to two hundred & thirty-five dol's				$235 00

And that he makes this affidavit & proof to the end that he be represented in the creditors' meeting the 21st April, (instant,) before William Seabrook, esqr., special master, at office, No. 48 Broad street, Charleston, S. C.

CALVIN J. COWLES.

Subscribed to and affirmed before me this 19th day of April, A. D. 1873.

F. W. AHRENS,
U. S. Commissioner for No. Carolina.

114 And on the 26th day of April, 1873, came into court John Bauskett, special master, and filed the following report; which report is in the words and tener following:

Report.

In the circuit court, in equity.

UNITED STATES OF AMERICA,
Fourth Circuit:

HARVEY TERRY
vs.
WILLIAM GODFREY ET AL. } Report of special master.

In obedience to the order of court in the above-entitled case, dated 9th day of April, 1873, the master begs leave respectfully to make the folfowing report:

At an examination of witnesses on the fifteenth day of April, A. D. 1873, at Cheraw, S. C., William Godfrey, John F. Matheson, and M. F. Ellerbe were sworn and their testimony taken down in writing, which is herewith submitted attached to this report.

The following facts were elicited: The bank failed on or about the first day of March, A. D. 1865. The last dividend was declared
115 in January, A. D. 1865; the amount of the dividend was five dollars per share in Confederate currency. The par value of the shares was one hundred dollars. William Godfrey is the receiver of the Merchants' Bank of South Carolina, at Cheraw, and was the president of the said bank at the time of its failure in March, 1865, and for several

years preceeding its failure. John F. Matheson was cashier of the said bank and M. F. Ellerbe was the bank's clerk.

The assestts of the bank consist of $464,700.00 of Confederate States bonds; $48,830.00 of South Carolina war-bonds; $16,091.79 of drafts that are barred by limitation; $41,821.91 of notes that are barred by limitation; three notes, amounting to seven hundred dollars, which have been paid in bills of the said bank.

One judgment against the C. & C. R. R. Co. for $2,500, and one tract of land near Mobile, Alabama, of forty or of ninety acres. The banking-house, lot, and furniture were sold under a judgment and execution of Hugh McCrea, of Nashville, two or three years ago. McCrea purchased the whole.

116 There were at the time of the failure of the said bank, or within twelve months previous thereto, sixty-four stockholders, whose names are here set out, with the amount of their respective shares opposite to each name:

H. D. Alexander	36 shares.	A. B. Davidson	60 shares.
J. D. Aiken	50 "	John Fraser & Co	30 "
R. J. Barrett	84 "	E. A. Gregg	30 "
J. W. Burns	20 "	R. M. Johnston, trustee	200 "
Jane Campbell	64 "	A. S. Johnston	16 "
Lewis M. Coker	15 "	O. H. Kolloch	4 "
A. D. Chapman	22 "	Robert Latta	200 "
Mary Little	20 "	Ann Little	20 "
Thos. S. Little	5 "	Geo. W. Little, trustee	5 "
Thos. H. Harlee	64 "	L. D. Bennett	20 "
H. T. Peake	4 "	A. B. Springs	60 "
R. A. Springs	60 "	R. C. Springs	60 "
Thos. Steele	13 "	E. N. Starrback	40 "
Jane Sparks	200 "	J. D. Wilson	14 "
J. J. Wilson	10 "	S. & W. Wallace, trustee'	90 "
S. & W. Wallace, ex'rs	44 "	Thos. P. Lide	7 "
J. F. Ledbetter	43 "	Peter B. Lalane	20 "
J. C. Lyons	50 "	M'r's Jeannette McFarlan	60 "
C. T. McFarlan	60 "	Miss Jeannette McFarlan	71 "
A. McQueen	90 "	J. F. Matheron	50 "
A. Maloy	100 "	D. Maloy	20 "
M. S. McCall	45 "	W. R. Myers	60 "
J. P. McCall	40 "	H. McIver	20 "
117 G. W. McIver	80 "	J. H. McIver	5 "
M. S. Martin	50 "	T. E. B. Pegues	300 "
" trustee for M. A. Means	50 "	T. C. Prieleau	6 "
" trustee for S. M. Martin	50 "	T. Price	50 "
Caleb Coker	105 "		
W. Godfrey	50 "		
John P. Little	148 "		
John P. Little	10 "		
B. F. Little	110 "		
M'r's H. K. Robbins	47 "		
Miss H. K. Robbins	46 "		
J. E. Robbins	46 "		
B. D. Townsend	50 "		
Allan McFarlan	500 "		

The shares were transferred to the bank on the 16th day of October, 1865, after the failure of the bank. No consideration was given by the bank for the stock, but it was simply surrendered.

All of which is most respectfully submitted.

JOHN BAUSKETT,
Special Master.

COLUMBIA, 23 *April*, 1873.

UNITED STATES OF AMERICA,
Fourth Circuit:

The State of South Carolina, in the circuit court, in equity.

HARVEY TERRY
vs.
WILLIAM GODFREY ET AL.

118 In obedience to the order of this court, dated 9th April, A. D. 1873, appointing me master in the above-stated case, and conferring certain powers and duties therein specified, I proceeded to Cheraw, in the circuit aforesaid, and took the following testimony:

The witnesses protest against this examination, on the following grounds:

1st. Because being parties to the record, they are not compellable to testify.

2nd. Because no notice of the time and place of the examination has been given to their attorneys, Mess'rs Simonton & Barker.

3rd. Because of any other reason which their attorneys may hereafter suggest.

Subject to this protest the examination is taken with the understanding that no use is to be made of it, and it is to remain in the possession of John Bauskett, esq., special master, until a copy is furnished to the attorneys of the said parties, Mess'rs Simonton & Barker, of Charleston, So. Ca., and that they have an opportunity to cross-examine said witnesses, for which purpose the said special master will attend at this place, Cheraw, South Carolina, on such day as may be hereafter agreed upon, provided that said day is within two weeks from this date,
119 and provided that the proposition is correct that Mess'rs Simonton & Barker are the attorneys of record of the witnesses examined to-day, and are contesting the above-mentioned case.

William Godfrey, sworn, says: My name is William Godfrey, I reside in Cheraw; my business just now is insurance agent. I am the receiver of the Merchants' Bank of South Carolina, at Cheraw, and was president of said bank for five or six years up to the time of its close. The bank closed finally about the first of March, A. D. 1865. The stockholders of the bank at the time of its failure, and within twelve months previous, H. D. Alexander, 36 shares; J. D. Aiken, 50 shares; R. J. Barrett, 84 shares; J. W. Burns, 20 shares; Jane Campbell, 64 shares; Lewis M. Coker, 15 shares; A. D. Chapman, 22 shares; A. B. Davidson, 60 shares; John Fraser & Co., 30 shares; E. A. Gregg, 30 shares; R. M. Johnston, trustee, 200 shares; A. S. Johnston, 16 shares; O. H. Kollock, 4 shares; Robert Latta, 200 shares; Mary Little, 20 shares; Ann Little, 20 shares; Thomas F. Little, 5 shares; Geo. W. Little, trustee, 5 shares: Thos. H. Harlee, 64 shares; L. D. Bennett, 20 shares; H. T. Peake, 4 shares; A. B. Springs, 60 shares; R. A. Springs, 60
120 shares; R. C. Springs, 60 shares; Thomas Steele, 13 shares; E. N. Starrback, 40 shares; Jane Sparks, 200 shares; J. D. Wilson, 14 shares; J. J. Wilson, 10 shares; S. & W. Wallace, trustee', 90 shares; S. & W. Wallace, ex'rs, 44 shares; Thomas P. Lide, 7 shares; J. F. Ledbetter, 43 shares; Peter B. Lalane, 20 shares; J. C. Lyons, 50 shares; M'r's Jeannette McFarlan, 60 shares; C. T. McFarlan, 60 shares; Miss Jeannette McFarlan, 71 shares; A. McQueen, 90 shares; J. F. Matheron, 50 shares; A. Maloy, 100 shares; D. Maloy, 20 shares; M. S. McCall, 45 shares; W. R. Myers, 60 shares; J. P. McCall, 40 shares;

H. McIver, 20 shares; G. W. McIver, 80 shares; J. H. McIver, 5 shares; M. S. Martin, 50 shares; M. S. Martin, trustee for M. A. Means, 50 shares; M. S. Martin, trustee for S. M. Martin, 50 shares; T. E. B. Pegues, 300 shares; T. C. Prieleau, 6 shares; T. Price, 50 shares; Caleb Coker, 106 shares. At the time of the failure of the bank, these 106 shares were transferred to the bank by Caleb Coker, on the 16th of October, 1865, as were the following: W. Godfrey, 50 shares; John P. Little, 148 shares, he afterwards added 10 shares from his mother's estate, making 158 shares; B. F. Little had 100 shares, & in May, 1868, he took 10 shares from his mother's estate, making 110 shares; M'r's H.
121 K. Robbins, 47 shares; Miss H. K. Robbins, 46 shares; J. S. Robbins, 46 shares; B. D. Townsend, 50 shares; Allan McFarlan had 500 shares, transferred 496 shares. I was the only acting officer of the bank at the time these transfers were made. These parties came to me and asked that the transfers be made, & I made them. The bank paid no consideration for the stock so transferred.

The assetts of the bank are sixteen thousand and ninety-one dollars and seventy-nine cents in drafts that are out of date, barred by the statute, and forty-four thousand nine hundred and twenty-one dollars and ninety-one cents of notes that are barred, with the exception of four, one of $200, one of $100, and one of $300. These have been paid in our own notes, and one on which the bank has a judgment against the C. &. C. R. R. Co., of $2,500. The bank owns about ninety acres of land near Mobile, Alabama. The bank took this land for a bad debt, at $40 per acre, or 40 acres at $90, he does not recollect which. The bank has $48,830 of South Carolina war-bonds, considered worth nothing; Confederate States bonds, $464,700. These were bought by
122 the bank mostly with Confederate money; about $50,000 of the first loan was paid for in specie, to the best of his recollection. The bank's last dividend was in January, 1865, of $5 per share in Confederate money nobody wanted scarcely. The banking-house & lot in Cheraw was sold some three or four years ago under a judgment of Hugh McCrea, of Nashville. He bought the property. The judgment was obtained in Charleston. There was no specie in the bank at its failure. There was no specie run off from the bank at the approach of the United States forces. The par value of the shares of the bank were $100.

John F. Matheson, sworn, says: My name is John F. Matheson. I reside in Cheraw, and do business as a clerk. I was cashier at the time of the final closing of the Merchants' Bank of South Carolina at Cheraw, on or about the first of March, A. D. 1865. The bank was a very good bank up to the time of the commencement of the war, and stood high, but I doubt whether the bank was solvent at the time of its final closing, on account of large investments in confederate bonds.
123 I do not recollect at what time these investments were made, and could not say without reference to the books of the bank. The bank also invested in war bonds of the State. If these had proven good, my impression is the bank would have been solvent. The paid-up capital of the bank was four hundred thousand dollars. I could not say without looking at the books what the circulation of the bank was, either at the time of the commencement of the war or at the time of its failure. We used in the bank Confederate money exclusively after a certain time, but what time I cannot recollect. I don't think there was any agreement between the bank and its depositors that the depositors should receive only such money as they deposited.

M. F. Ellerbe, sworn, says: *I* My name is M. F. Ellerbe. I reside and do business in Cheraw. I was discount-clerk in the Merchants' Bank of South Carolina, at Cheraw, for some time previous to the war & up to the year 1862. Up to that time I never knew the said bank to
124 refuse payment in specie for its notes. I have no books, papers, or other property of the bank in my possession or control.

JOHN BAUSKETT,
Special Master.

15 APRIL, '73.

And on the 21st day of November, 1873, came into court Mess. Chambe'lain, Seabrook & Dunbar, attorneys for plaintiff, and Mess. Simonton & Barker & Magrath & Loundes, and filed the following consent; which consent is in the words and tener following:

Consent.

HARVEY TERRY
vs.
W'M GODFREY, REC'R.

In this case we consent that the master pro hac vice file a supplemental report, setting forth that the Merchants' Bank of Cheraw suspended specie payments, in common with other *with other* banks in the State, on the 29th Nov'r, 1860, and never after resumed specie payments.

Nov. 21st, 1873.

CHAMBERLAIN, SEABROOK & DUNBAR,
Att'ys for Pl'ff.

SIMONTON & BARKER,
125 *Att'ys for Defendant.*

MAGRATH & LOUNDES,
Solicitors.

And on the 21st day of November, 1873, came into court William Seabrook, special master, and filed the following report; which report is in the words and tener following:

Report.

UNITED STATES OF AMERICA,
South Carolina District, in Equity:

HARVEY TERRY
vs.
WILLIAM GODFREY ET AL.

Supplemental report of W'm Seabrook, esq., special master.

In pursuance of the order of reference in this case, and with the consent of counsel for complainant and defendants, I respectfully report that, upon proof furnished, I find that the Merchants' Bank of Cheraw suspended specie payments, in common with other banks in the State of South Carolina, on the 29th November, A. D. 1860, and never after resumed specie payments.

126 21st November, 1873.

WILLIAM SEABROOK,
Special Master.

And on the 26th day of April, 1873, came into court D. T. Corbin, for D. H. Chamberlain, solicitor for plaintiff, and filed the following statement of facts; which said statement of facts are in the words and tener following:

Statement of facts.

United States circuit court, South Carolina district, fourth circuit.

TERRY
vs.
MERCHANTS' BANK OF SOUTH CAROLINA, AT Cheraw, et al.

In this case the following facts are agreed to by counsel in the cause, and to be considered as testimony in the same before the court:

1. The Merchants' Bank of South Carolina, at Cheraw, suspended specie payments at the same time with the other banks in the State; was so suspended in November, 1860, and never after resumed specie payments.

2. The said bank ceased to pay out its bills as soon as the Confederate currency began to circulate. The last time at which any of its
127 bills were paid out was on the 6th August, 1861.

3. In his regular business as banker and broker the complainant, Harvey Terry, bought the notes and bills of the said Merchants' Bank of South Carolina, as proved by him in this case, amounting to over twenty thousand dollars, at prices ranging from twenty cents to five cents on the dollar of their face-value. Most of these purchases were made in 1868 and 1869, at about fifteen cents on the dollar.

4. That the circuit court of the United States for the district of South Carolina was held in Charleston on the 12th day of June, A. D. 1866.

D. T. CORBIN,
For D. H. CHAMBERLAIN,
Solicitor for Pl'ff.

And on the 26th day of April, 1874, came into court Mess. Simonton & Barker and A. G. Magrath, solicitors for defendants, and filed the following exceptions to special master's report; which exceptions are in the words and tener following:

Exceptions to special master's report.

UNITED STATES OF AMERICA,
128 *Fourth Circuit, South Carolina District:*

HARVEY TERRY
vs.
THE MERCHANTS' BANK OF SOUTH CAROLINA, at Cheraw, et als.

Exceptions of defendants to the report of special master.

The defendants except to the report of John Bauskett, esq., special master, appointed under order of 9th April, 1873, on the following grounds:

1. That the said report assumes "the day of failure of the said bank"

to be the first day of March, in the year of our Lord one thousand eight hundred and sixty-five, and the special master thereupon reports certain persons stockholders of said bank on that day and for twelve months prior thereto as liable by reason of such failure; whereas the proof is the Merchants' Bank of South Carolina, at Cheraw, suspended specie payments at the same time with the other banks in the State of South Carolina, was so suspended in November, 1860, and never afterwards resumed specie payments.

2. That there was no other testimony than the date of suspen-
129 sion of specie payments by which the date of actual failure could be ascertained or determined.

3. That the names reported by the special master as "stockholders of the bank at the time of its failure and within twelve months previous thereto" are the names of those persons who were stockholders on the first day of March, 1865, the assumed day of failure, and are not the names of those who were such stockholders at the date of actual failure, and within twelve months previous thereto.

SIMONTON & BARKER,
Def'ts' Solicitors.
A. G. MAGRATH,
For JOHN FRASER & CO.

And on the 15th day of December, 1874, came into court D. H. Chamberlain, solicitor for complainant, per D. T. Corbin, and filed the following amendment to bill; which amendment is in the words and tener following:

Amendment to bill.

HARVEY TERRY
vs.
W'M GODFREY, RECEIVER, ET AL.

130 Now comes the complainant in the above-entitled cause, and by leave of the court amends his bill of complaint by striking out of the same, wherever it occurs, the names of William Godfrey, receiver of the Merchants' Bank of Cheraw, and John F. Mathewson as cashier.

D. H. CHAMBERLAIN,
Sol'r for Complainant,
Per D. T. CORBIN.

DEC. 15, 1874.

We consent.

SIMONTON & BARKER,
Def'ts' Solicitors.
A. G. MAGRATH.

And at the November term, 1874, of the said court, after hearing argument by the solicitors for complainant and defendants, and the statements of facts agreed upon by them, the court, after mature deliberation, rendered the following decree:

Decree.

UNITED STATES OF AMERICA,
District of South Carolina:

In the circuit court of the United States for the district of South Carolina, in equity.

HARVEY TERRY ET AL.
vs.
WILLIAM GODFREY, ESQR., RECEIVER OF Merchants' Bank of South Carolina, at Cheraw, et al.

131 This cause came on to be heard on the pleadings and reports and exceptions hereto filed, and after hearing arguments of Mess'rs Chamberlain and Seabrook, for complainant, and Mess'rs Magrath and Loundes and Mess'rs Simonton & Barker, for defendants, it is ordered, adjudged, and decreed that the exceptions be overruled, and that the persons who held shares of stock in the Merchants' Bank of South Carolina, at Cheraw, on the first day of the month of March, A. D. 1865, or who were interested therein within twelve months previous to said first day of March, 1865, are liable and are held bound, individually, to the complainants herein for a sum not exceeding twice the amount of the share or shares held by said shareholders respectively.

It appears from the report of John Bauskett, esquire, special master, that at the said date, (March 1st, 1865,) or within twelve months previous to said date, the following persons held shares of stock of said bank, as follows:

H. D. Alexander held thirty-six (36) shares of stock of said bank.

That J. D. Aiken held fifty (50) shares of stock of said bank.

132 That R. J. Barrett held eighty-four (84) shares of stock of said bank.

That J. W. Burns held twenty (20) shares of stock of said bank.

That Jane Campbell held sixty-four (64) shares of stock of said bank.

That Lewis M. Coker held fifteen (15) shares of stock of said bank.

That A. D. Chapman held twenty-two (22) shares of stock of said bank.

That Mary Little held twenty (20) shares of stock of said bank.

That Thomas F. Little held five (5) shares of stock of said bank.

That Thomas H. Harlee held sixty-four (64) shares of stock of said bank.

That A. B. Davidson held sixty (60) shares of stock of said bank.

That John Frazer & Company held thirty (30) shares of stock of said bank.

That E. A. Gregg held thirty (30) shares of stock of said bank.

That R. M. Johnston, as trustee, held two hundred shares (200) of stock of said bank.

That A. S. Johnston held sixteen (16) shares of stock of said bank.

That O. H. Kollock held four (4) shares of stock of said bank.

133 That Robert Latta held two hundred (200) shares of stock of said bank.

That Ann Little held twenty (20) shares of stock of said bank.

That George W. Little, trustee, held five (5) shares of stock of said bank.

That L. D. Bennett held twenty (20) shares of stock of said bank.

That H. T. Peake held four (4) shares of stock of said bank.
That A. B. Springs held sixty (60) shares of stock of said bank.
That R. A. Springs held sixty (60) shares of stock of said bank.
That R. C. Springs held sixty (60) shares of stock of said bank.
That Thomas Steele held thirteen (13) shares of stock of said bank.
That E. N. Stanback held forty (40) shares of stock of said bank.
That Jane Sparks held two hundred (200) shares of stock of said bank.
That J. D. Wilson held fourteen (14) shares of stock of said bank.
That J. J. Wilson held ten (10) shares of stock of said bank.
That S. & W. Wallace, trustees, held ninety (90) shares of stock of said bank.
That S. & W. Wallace, executors, held forty-four (44) shares of
134 stock of said bank.
That Thomas P. Lide held seven (7) shares of stock of said bank.
That J. F. Ledbetter held forty-three (43) shares of stock of said bank.
That Peter B. Lelain held twenty (20) shares of stock of said bank.
That J. C. Lyons held fifty (50) shares of stock of said bank.
That M'r's Janette McFarlan held sixty (60) shares of stock of said bank.
That C. T. McFarlan held sixty (60) shares of stock of said bank.
That Miss Jeannette McFarlan held seventy-one (71) shares of stock of said bank.
That A. McQueen held ninety (90) shares of stock of said bank.
That J. F. Matherson held fifty (50) shares of stock of said bank.
That A. Maloy held one hundred (100) shares of stock of said bank.
That D. Maloy held twenty (20) shares of stock of said bank.
That M. S. McCall held forty-five (45) shares of stock of said bank.
That W. R. Myers held sixty (60) shares of stock of said bank.
That J. P. McCall held forty (40) shares of stock of said bank.
135 That Henry McIver held twenty (20) shares of stock of said bank.
That George W. McIver held eighty (80) shares of stock of said bank.
That J. H. McIver held five (5) shares of stock of said bank.
That M. S. Martin held fifty (50) shares of stock of said bank.
That M. S. Martin, trustee for M. A. Means, held fifty (50) shares of stock of said bank.
That M. S. Martin, trustee for S. M. Martin, held fifty (50) shares of stock of said bank.
That T. E. B. Pegues held three hundred (300) shares of stock of said bank.
That T. C Prioleau held (6) shares of stock of said bank.
That T. Price held fifty (50) shares of stock of said bank.
That Caleb Coker held one hundred and six (106) shares of stock of said bank.
That William Godfrey held fifty (50) shares of stock of said bank.
That John P. Little held one hundred and fifty-eight (158) shares of stock of said bank.
That B. F. Little held one hundred and ten (110) shares of stock of said bank.
That M'r's H. K. Robbins held forty-seven (47) shares of stock of said bank.
136 That Miss H. R. Robbins held forty-six shares of stock of said bank.
That J. E. Robbins held forty-six (46) shares of stock of said bank.
That B. D. Townsend held fifty (50) shares of stock of said bank.

That Allan McFarlan held five hundred (500) shares of stock of said bank.

And that each of said persons is, therefore, liable to pay twice the amount of the face-value (one hundred dollars) of each share of stock held by him or them respectfully, as follows, to wit:

H. D. Alexander is liable to pay seven thousand two hundred ($7,200) dollars.

J. D. Aiken is liable to pay ten thousand ($10,000) dollars.

R. J. Barrett is liable to pay sixteen thousand eight hundred ($16,800) dollars.

J. W. Burns is liable to pay four thousand ($4,000) dollars.

Jane Campbell is liable to pay twelve thousand eight hundred ($12,800) dollars.

Lewis M. Coker is liable to pay three thousand ($3,000) dollars.

A. D. Chapman is liable to pay four thousand four hundred ($4,400) dollars.

Mary Little is liable to pay four thousand ($4,000) dollars.

137 Thomas F. Little is liable to pay one thousand ($1,000) dollars.

Thomas H. Harlee is liable to pay twelve thousand four hundred ($12,400) dollars.

A. B. Davidson is liable to pay twelve thousand ($12,000.00) dollars.

John Frazer & Company is liable to pay six thousand ($6,000.00) dollars.

E. A. Gregg is liable to pay six thousand ($6,000) dollars.

R. M. Johnston, as trustee, is liable to pay forty thousand ($40,000) dollars.

A. S. Johnston is liable to pay three thousand two hundred ($3,200) dollars.

O. H. Kollock is liable to pay eight hundred ($800) dollars.

Robert Latta is liable to pay forty thousand ($40,000) dollars.

Ann Little is liable to pay four thousand ($4,000.00) dollars.

George W. Little is liable to pay one thousand ($1,000.00) dollars.

L. D. Bennett is liable to pay four thousand ($4,000) dollars.

H. T. Peake is liable to pay eight hundred ($800.00) dollars.

A. B. Springs is liable to pay twelve thousand ($12,000) dollars.

138 R. A. Springs is liable to pay twelve thousand ($12,000) dollars.

R. C. Springs is liable to pay twelve thousand ($12,000) dollars.

Thomas Steele is liable to pay two thousand six hundred ($2,600) dollars.

E. N. Starrback is liable to pay eight thousand ($8,000) dollars.

Jane Sparks is liable to pay forty thousand ($40,000) dollars.

J. D. Wilson is liable to pay two thousand eight hundred ($2,800) dollars.

J. J. Wilson is liable to pay two thousand ($2,000) dollars.

S. & W. Wallace, trustees, are liable to pay eighteen thousand dollars ($18,000.)

S. & W. Wallace, executors, are liable to pay eight thousand eight hundred ($8,800) dollars.

Thomas P. Lide is liable to pay one thousand four hundred ($1,400.00) dollars.

J. F. Ledbetter is liable to pay eight thousand six hundred ($8,600.00) dollars.

Peter B. Lalane is liable to pay four thousand ($4,000.00) dollars.

J. C. Lyons is liable to pay ten thousand ($10,000.00) dollars.

Mrs. Jeannette McFarlan is liable to pay twelve thousand ($12,000) dollars.

C. F. McFarlan is liable to pay twelve thousand ($12,000) dollars.

139 Miss Jeannette McFarlan is liable to pay twelve thousand ($12,000) dollars.

A. McQueen is liable to pay eighteen thousand ($18,000.00) dollars.

J. F. Matherson is liable to pay ten thousand ($10,000.00) dollars.

A. Malloy is liable to pay twenty thousand ($20,000) dollars.

D. Malloy is liable to pay four thousand ($4,000.00) dollars.

M. S. McCall is liable to pay nine thousand ($9,000.00) dollars.

W. R. Myers is liable to pay twelve thousand ($12,000.00) dollars.

J. T. McCall is liable to pay eight thousand ($8,000.00) dollars.

Henry McIver is liable to pay four thousand ($4,000.00) dollars.

George W. McIver is liable to pay sixteen thousand ($16,000.00) dollars.

J. H. McIver is liable to pay one thousand ($1,000.00) dollars.

M. S. Martin is liable to pay ten thousand ($10,000.00) dollars.

M. S. Martin, trustee for M. A. Means, is liable to pay ten thousand ($10,000.00) dollars.

M. S. Martin, trustee for S. Martin, is liable to pay ten thousand ($10,000) dollars.

140 T. E. B. Pegues is liable to pay sixty thousand ($60,000.00) dollars.

T. C. Prioleau is liable to pay one thousand two hundred ($1,200) dollars.

T. Price is liable to pay ten thousand ($10,000.00) dollars.

That B. M. Edwards, James L. Coker, and W. C. Coker, executors of Caleb Coker, deceased, are liable to pay twenty-one thousand two hundred ($21,200) dollars.

William Godfrey is liable to pay ten thousand ($10,000) dollars.

John P. Little is liable to pay thirty-one thousand six hundred ($31,600) dollars.

B. F. Little is liable to pay twenty-two thousand ($22,000) dollars.

M'r's H. K. Robbins is liable to pay nine thousand four hundred ($9,400) dollars.

Miss H. K. Robbins is liable to pay nine thousand two hundred ($9,200) dollars.

J. E. Robbins is liable to pay nine thousand two hundred ($9,200) dollars.

B. D. Townsend is liable to pay ten thousand ($10,000) dollars.

Allan McFarlan is liable to pay one hundred thousand ($100,000.00) dollars.

It is further ordered, adjudged, and decreed, that the clerk of this court do enter up judgment for the complainants to the amounts

141 of their respective bills proven in this cause as hereinafter stated.

It appears from the reports of William Seabrook, esqr., special master in this cause now before us, that the following persons hold and have proved bills of said bank in this cause, with protest and interest thereon, as follows:

Harvey Terry, the complainant in this cause, has proved bills to the amount of one thousand two hundred and forty-five dollars, protest waived on the 3rd day of March, 1869, which said notes and interest amount to one thousand seven hundred and four $\frac{96}{100}$ ($1,704.96) dollars.

Five thousand seven hundred and seventy-five dollars of said bank notes protested on the 28th day of April, 1870, which said notes and interest amount to seven thousand four hundred and forty-seven $\frac{53}{100}$ ($7,447.53) dollars.

Ten thousand two hundred and twenty-five dollars of said bank notes protested on the 3rd day of August, 1870, and interest thereon amount to twelve thousand nine hundred and ninety-two $\frac{87}{100}$ ($12,992.87) dollars.

142 And five thousand eight hundred and ninety-five dollars of said bank notes not protested, making in the aggregate the amount of twenty-eight thousand and forty $\frac{36}{100}$ ($28,040.36) dollars.

Archibald King proved notes to the amount of one hundred and ten dollars.

Anthony J. Salinas proved to the amount of one hundred and thirty dollars.

Andrew Simonds proved notes to the amount of fifty-five dollars.

Calvin J. Cowles proved notes to the amount of two hundred and thirty-five dollars.

And Simonton & Barker proved the notes of said bank to the amount of twenty-six thousand seven hundred and sixty dollars.

And it is ordered that the said bill-holders respectively have execution against said defendants, stockholders above-named, for the several amounts above stated and costs.

It is further ordered that as to the defendant Richard Lathers, the said bill be dismissed with costs.

HUGH L. BOND,
C't Judge.

DEC. 15, 1874.

143 And at the said November term 1874, came into court Mess'rs Simonton & Barker and A. G. Magrath, solicitors for defendants, and then and there prayed that an appeal be granted from the said decree, rendered as aforesaid, which prayer was granted.

The appeal is in the words and of the tener following:

Appeal.

Defendants come and pray an appeal from this decree to the Supreme Court.

SIMONTON & BARKER,
A. G. MAGRATH,
Def'ts Solicitors.

Appeal allowed.

HUGH L. BOND,
C't Judge.

DEC'R 15, 1874.

And on the 15th day of December, 1874, came into court Harvey Terry, the complainant, and filed the following waiver of security, which waiver of security is in the words and tener following:

Waiver of security.

THE UNITED STATES OF AMERICA,
District of South Carolina:

HARVEY TERRY
144 *vs.*
WILLIAM GODFREY ET ALS.

The complainant waives the requirement of an appeal-bond from the

defendants in this case, and his right to issue execution pending the appeal to the Supreme Court.

HARVEY TERRY,
Complainant.

And on the 18th day of August, A. D. 1875, came into court William Godfrey, Henry McIver, A. D. Chapman, J. F. Matheson, L. M. Coker, George W. McIver, J. H. McIver, B. M. Edwards, James L. Coker, and W. C. Coker, executors of Caleb Coker, dece'd, Joseph D. Aiken and H. D. Alexander, by their solicitors, Simonton & Barker, George A. Trenholm, James T. Welsman, Theodore D. Wagner, Charles K. Prioleau, & William L. Trenholm, under the firm name of John Fraser & Co., by their solicitor, A. G. Magrath, and filed the following petition for appeal, which petition is in the words and tenor following:

Petition for appeal.

UNITED STATES OF AMERICA,
145 *Fourth Circuit, South Carolina District:*

HARVEY TERRY
vs.
WILLIAM GODFREY AND OTHERS.

To the honorable the judges of the circuit court of the United States for said district:

The humble petition of William Godfrey, Henry McIver, A. D. Chapman, J. F. Matheson, L. M. Coker, George W. McIver, J. H. McIver, B. M. Edwards, James L. Coker, and W. C. Coker, the last three as executors of Caleb Coker, deceased, Joseph D. Aiken, and H. D. Alexander, by their attorneys, Simonton & Barker, George A. Trenholm, James T. Welsman, Theodore D. Wagner, Charles K. Prioleau, and William L. Trenholm, the last named five lately being co-partners, trading under the firm name of John Fraser & Company, by A. G. Magrath, esq., their attorney, sheweth:

1. That by decree dated 15' December, A. D. 1874, in the above-mentioned cause, judgment was ordered to be entered against the
146 above-named parties, defendant, together with other persons named in said decree, &c.

2. That said decree dated as aforesaid is, as your petitioners are advised, erroneous, and the same ought to be reversed.

Your petitioners humbly pray that they may be allowed an appeal from said decree to the Supreme Court of the United States.

SIMONTON & BARKER.
A. G. MAGRATH.

And on the 18th day of August, A. D. 1875, came into court the defendants, William Godfrey et al., by their solicitors, Simonton & Barker & A. G. Magrath, and obtained the following allowance of appeal, which allowance is in words and tenor following:

Allowance of appeal.

Appeal allowed as prayed for.

HUGH L. BOND,
Ct Judge.

And on the 9th day of September, A. D. 1875, came into court the defendants, William Godfrey, Henry McIver, A. D. Chapman, J.
147 F. Matherson, L. M. Coker, George W. McIver, J. H. McIver, B. M. Edwards, James L. Coker, and W. C. Coker, executors of Caleb Coker, dec'd, Joseph D. Aiken, H. D. Alexander, George A. Trenholm, Theodore D. Wagner, Charles K. Prioleau, & William L. Trenholm, by their solicitors, Simonton & Barker, & A. G. Magrath, and filed the following notice, which notice is in the words and tenor following:

Notice.

UNITED STATES OF AMERICA,
Fourth Circuit, South Carolina District:

The President of the United States to A. B. Springs, R. A. Springs, A. McQueen, J. S. Sparks, J. D. Wilson, D. Malloy, H. T. Peake.

You are hereby summoned to be and appear before the judge of the Supreme Court of the United States at the Capitol at Washington, on the second Monday in October next, then and there to join with William Godfrey, Henry McIver, A. D. Chapman, J. F. Matheson, L. M. Coker, George W. McIver, J. H. McIver, B. M. Edwards, James L. Coker, and W. C. Coker, the last three as executors of Caleb
148 Coker, deceased, Joseph D. Aiken, and H. D. Alexander, George A. Trenholm, Theodore D. Wagner, Charles K. Prioleau, and William L. Trenholm, the last named five lately being co-partners, trading under the name and firm of John Fraser and Company, in prosecuting an appeal from the decree of the circuit court of the United States for the fourth circuit, South Carolina district, rendered at Charleston, South Carolina, the 15th December, A. D. 1874, in the cause entitled Harvey Terry vs. William Godfrey and others, against you and the above-named parties, appellants.

And also that you do within thirty days after the service thereof file or cause to be filed with the clerk of the circuit court for said district a notice of severence if you do not desire to be joined with the said appellants above named, as an appellant in the prosecution of the said appeal.

Witness the honorable Morrison R. Waite, Chief-Justice of the United States of America, at Charleston, in said South Carolina district, the ninth day of September, A. D. 1875, and in the one hundredth year of the Sovereignty and Independence of the United States.

SIMONTON AND BARKER &
A. G. MAGRATH,
For Appellants.

149 [SEAL.]

J. E. HAGOOD,
C. C. C. U. S. for So. Ca.

Acceptance of service.

STATE OF SOUTH CAROLINA:

I hereby accept service of this notice, and hereby signify that I desire that the defendants whom I represent be joined in the appeal with the other appellants.

11th Sept., 1875.

JAS. H. RION,
Attorney for A. B. Springs and R. A. Springs.

And on the 9th day of September, A. D. 1875, came into court the defendants William Godfrey, Henry McIver, J. H. McIver, A. D. Chap-

man, J. F. Matheson, L. M. Coker, George W. McIver, J. H. McIver, B. M. Edwards, James L. Coker, & W. C. Coker, executors of Caleb Coker, dec'd, Joseph D. Aiken, H. D. Alexander, George A. Trenholm, Theodore D. Wagner, Charles K. Prioleau, & William A. Trenholm, by their solicitors, Simonton & Barker & A. G. Magrath, and filed the following notice, which notice is in the words and tenor following:

150 *Notice.*

UNITED STATES OF AMERICA,
Fourth Circuit, South Carolina District:

The President of the United States to A. B. Springs, R. A. Springs, A. McQueen, J. S. Sparks, J. D. Wilson, D. Malloy, H. T. Peake:

You are hereby summoned to be and appear before the judges of the Supreme Court of the United States at the Capitol at Washington, on the second Monday in October next, then and there to join with William Godfrey, Henry McIver, J. H. McIver, A. D. Chapman, J. F. Matheson, L. M. Coker, George W. McIver, J. H. McIver, B. M. Edwards, James L. Coker, and W. C. Coker, the last three as executors of Caleb Coker, deceased, Joseph D. Aiken, and H. D. Alexander, George A. Trenholm, Theodore D. Wagner, Charles K. Prioleau, and William L. Trenholm, the last named five lately being co-partners, trading under the name and firm of John Fraser and Company, in prosecuting an appeal from the decree of the circuit court of the United States for the fourth circuit,
South Carolina district, rendered at Charleston, South Carolina,
151 the 15th December, A. D. 1874, in the cause entitled Harvey Terry vs. William Godfrey and others, against you and the above-named parties, appellants.

And also that you do within thirty days after the service thereof, file or cause to be filed with the clerk of the circuit court for said district, a notice severance, if you do not desire to be joined with the said appellants above-named, as an appellant in the prosecution of the said appeal.

Witness the honorable Morrison R. Waite, Chief-Justice of the United States of America, at Charleston, in said South Carolina district, the ninth day of September, A. D. 1875, and in the one hundredth year of the Sovereignty and Independence of the United States of America.

SIMONTON & BARKER &
A. G. MAGRATH,
Attorneys for Appellants.

[SEAL.]

J. E. HAGOOD,
C. C. C. U. S. for S. C.

Marshal's return.

UNITED STATES OF AMERICA,
District of South Carolina:

152 I, J. J. Carrington, deputy U. S. marshal, hereby certify that I served the within notice on Henry T. Peake, at Martin's Depot, Laurens County, S. C., on the 11th day of September, 1875, personally by leaving a copy thereof with him, and that I know the party so served to be the one described in the within notice as H. T. Peake.

Sept. 11, 1875.

J. J. CARRINGTON,
Deputy Marshal.

Return sworn to before me Sept. 11th, 1875.

Y. J. HARRINGTON,
Notary Public, S. C.

Acceptance of service.

I acknowledge service of this notice, and desire to be joined in the appeal as a party appellant.

Charleston, September 13, 1875.

H.-T. PEAKE.

And on the 9th day of September, A. D. 1875, came into court the defendants, William Godfrey, Henry McIver, J. H. McIver, A. D. Chapman, J. F. Matheson, L. M. Coker, George W. McIver, J. H. McIver, B. M. Edwards, James L. Coker, & W. C. Coker, executors of Caleb Coker, dec'd, Joseph D. Aiken, H. D. Alexander, George A. Trenholm,
153 Theodore D. Wagner, Charles K. Prioleau, & William L. Trenholm, by their solicitors, Simonton & Barker & A. G. Magrath, and filed the following notice, which notice is in the words and tenor following:

Notice.

UNITED STATES OF AMERICA,
Fourth Circuit, South Carolina District:

The President of the United States to A. B. Springs, R. A. Springs, A. McQueen, J. S. Sparks, J. D. Wilson, D. Malloy, H. T. Peake:

You are hereby summoned to be and appear before the judges of the Supreme Court of the United States at the Capitol at Washington, on the second Monday in October next, then and there to join with William Godfrey, Henry McIver, A. D. Chapman, J. F. Matheson, L. M. Coker, George W. McIver, J. H. McIver, B. M. Edwards, James L. Coker, and W. C. Coker, the last three as executors of Caleb Coker, deceased, Joseph D. Aiken, and H. D. Alexander, George A. Trenholm, Theodore D. Wagner, Charles K. Prioleau, and William L. Trenholm, the last-named five lately being copartners trading under the name and
154 firm of John Fraser and Company, in prosecuting an appeal from the decree of the circuit court of the United States for the fourth circuit, South Carolina district, rendered at Charleston, South Carolina, the 15th December, A. D. 1874, in the cause entitled Harvey Terry vs. William Godfrey and others, against you and the above-named parties, appellant.

And also that you do within thirty days after the service thereof file or cause to be filed with the clerk of the circuit court for said district a notice of severance if you do not desire to be joined with the said appellants above named as an appellant in the prosecution of the said appeal.

Witness the honorable Morrison R. Waite, Chief-Justice of the United States of America at Charleston, in said South Carolina district, the ninth day of September, A. D. 1875, and in the hundredth year of the sovereignty and Independence of the United States of America.

SIMONTON & BARKER,
A. G. MAGRATH,
Attorneys for Appellants.

[SEAL.] J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

155 *Acceptance of service & appeal.*

I acknowledge personal service of a copy of this notice this fourteenth day of September, A. D. 1875.

D. MALLOY.

In presense of—
H. D. MALLOY, [L. S.]
Notary Public.

I acknowledge personal service of a copy of this notice this fourteenth day of September, A. D. 1875.

A. McQUEEN.

In presence of—
H. D. MALLOY, [L. S.]
Notary Public.

We do hereby signify our desire to be joined as appellants in this appeal.

D. MALLOY.
A. McQUEEN.

In presence of—
H. D. MALLOY, [L. S.]
Notary Public.

I acknowledge personal service of a copy of this notice this 15th day of September, A. D. 1875.

J. D. WILSON.

UNITED STATES OF AMERICA,
Fourth Circuit, South Carolina District:

156 *Notice to join in appeal to Supreme Court of U. S. or to file notice of severence.*

HARVEY TERRY
vs.
W. GODFREY & OTHERS.

I, Isaac D. Wilson, having been duly served with a copy of the above-stated notice, do hereby signify my desire to be joined as an appellant in the prosecution of said appeal with William Godfrey and others, appellants in the above-stated case, this 21st day of September, 1875.

J. D. WILSON.

And on the 17th day of September, A. D. 1875, came into court the defendant, B. W. Edwards, and filed the following affidavit, which affidavit is in the words and tenor following:

Affidavit.

THE STATE OF SOUTH CAROLINA,
Darlington County:

Personally appears B. W. Edwards, who, being duly sworn, says that from a careful examination of the records of the office of probate for the said county and State, & from personal knowledge, he is able to state that M'r's Jennet Sparks departed this life several years ago (since the recent war among the States) intestate, and that no administra-
157 tion has been taken out on her estate, there being, in fact, no estate upon which to administer.

That, by the will of Alexander Sparks, under which she took, before the war, shares in the Merchants' Bank of Cheraw of stock, all the real & personal estate devised and beque'thed to to her, was limited to her natural life, except the $20,000, to be taken at her option in stock or otherwise, which she might convey by deed or will to any person named,

& in default thereof the same to go to M'r's Elizabeth D. Lide & M'r's Margaret J. Wilson.

There was no deed or will concerning the stock, but the parties named took nothing, as the bank was, at M'r's Sparks' death, insolvent, and the other property limited has been taken by the parties named.

B. W. EDWARDS.

Sworn to before me this 17th day of September, 1875.

[SEAL.] JONATHAN WRIGHT,
C. C. P.

Clerk's certificate.

In the circuit court.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

158 I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing is a true copy of the records and proceedings and of the decree in the case of Harvey Terry, plaintiff, against William Godfrey, receiver of the Merchants' Bank of South Carolina at Cheraw et al., rendered as aforesaid, together with things relating to the same.

Given under my hand and the seal of said court, at clerk's office, in the city of Charleston, S. C., this the 29th day of September, A. D. 1875.

[SEAL.] J. E. HAGOOD,
C. C. C. U. S., Dist. of S. C.

(Indorsement on cover:) No. 168. William Godfrey et al., appellants, vs. Harvey Terry. So. Carolina C. C. U. S. Filed 7th October, 1875.

Supreme Court of the United States.

OCTOBER TERM, 1877.

WILLIAM GODFREY ET AL
vs.
HARVEY TERRY. } No. 168.

BRIEF FOR APPELLANT.

The complainant's right of action was barred by the Statute of Limitations when his action was brought.

The clause in the charter on which this action is founded is identical with that considered in Carrol *vs.* Green, 92 U. S., 510. This court held that an action on that clause must be brought in four years from the time it accrued.

This bill was filed December 2, 1870. There is nothing in the record to show that the subpœnas were lodged with the marshal before the 11th February, 1871. The first defendant served was served on the 14th February, 1871. (Trans., fol. 36.)

If this court holds that the right of action accrued in November, 1860, the time of suspension of specie payment, and therefore of the "failure of the bank," the action was clearly barred on the 2d December, 1870, when the bill was filed.

If the right of action is held to have accrued on the 1st March, 1865, more than four years elapsed between that day and the 2d December, 1870, and the action is, then, equally barred.

But it is contended that by the operation of the stay law of South Carolina the Statute of Limitation was sus-

pended from the 1st March, 1865, until the 21st December, 1866, and that time began to run against this right of action only from the latter day.

If this view were conceded, still the right of action is barred, because more than four years elapsed between the 21st December, 1866, and the day on which this action was brought, viz.: February 11, 1871, when process was first lodged with the marshal.

It seems to be consonant to equity to hold that an action cannot be said to be brought until process is served. If the mere taking out of process, without service, saves the right, then a right might be indefinitely maintained, while time is destroying the means of defence of the other side. "It would," said the court, in reference to an analagous question, "be a novel and unjust principle to make the defendants responsible for a proceeding of which they had no notice. Miller *vs.* McIntyre, 6 Pet., 61.

The sixteenth rule in equity provides that a suit is to be entered on the docket as pending, when subpœna has been returned as served.

But it is settled law that the action is not brought within the meaning of the Statute of Limitation until the process is *delivered to the sheriff, or his deputy, with a bona fide intention to be served upon the defendant.*

"The general rule appears to be, in this country, that at the time of suing out the writ, the action commences: and either when the writ is delivered to the sheriff, or to his deputy, or when it is sent to either of them, with a *bona fide* intention to be served upon the defendant, it is considered to have issued."

Angel Lim., § 312.

"At the present day the filing of a bill, and taking out the subpœna, and *making a bona fide attempt* to serve it, is a commencement of a suit in equity as against the defendant himself, so as to prevent the operation of the statute, if the suit be afterwards prosecuted with diligence."

Ibid., § 330.

"We do not think it indispensably necessary in such cases to prove an actual delivery of the writ to the sheriff, provided it be shown that it was actually made out and sent to the sheriff, or his deputy, by mail or otherwise, with a *bona fide* and absolute intention of having it served. But such intention must be positive and unequivocal."

Burdich *vs.* Green., 18 John., 20.

"The suing out of the writ is undoubtedly the commencement of the suit; but the writ is not considered as legally sued out until it is delivered to the sheriff, with authority to him to serve it on the defendant, if he can be found, within his bailiwick, or is placed in his office, or is transmitted to him with the purpose of being served."

Jackson *vs.* Brooks, 14 Wend., 654.

Per Walworth, Ch.

A subpœna was taken out, and a *bona fide* attempt made to serve it. Held sufficient.

Webb *vs.* Pell, 1 Paige, 564.

"At the present day, the filing of a bill and taking out a subpœena thereon, and making a *bona fide* attempt to serve it without delay, may be considered the commencement of a suit for the purpose of preventing the operation of the Statute of Limitation." Walworth, Ch. Hayden *vs.* Bucklin, 9 Paige, 514.

It appears, from these cases, that to save the bar of the statute, it was not sufficient to file a bill and to have the subpœna tested within the period prescribed.

Before the expiration of that period three other things must have been done:

1. Process must have been delivered to the officer.
2. There must be shown to have been an unequivocal intention to have it served.
3. There must have been an effort to serve.

In the present case the subpœna does not appear to have been put into the marshal's hands until the bar of

the statute had taken effect, viz.: February 11, 1871. If it was sooner in his hands, there was no proof of an intention to serve it; and equally, there was no proof of an attempt to serve it.

If the filing of the bill on the 2d December, 1870, saved the right as to these defendants, it saved it equally as to the others named in the subpœna and not yet served.

2. But the Statute of Limitation was not suspended by the stay laws of South Carolina.

The State Statute of Limitations is the law of the United States court, by virtue of the 34th section of the Act 1789, S. L. I., 81, which is in these words:

"The laws of the several States, *except where* the Constitution, treaties, or *statutes of the United States shall otherwise require or provide*, shall be regarded as rules of decision in trials at common law in courts of the United States, where they apply."

Now, the United States have, by statute, provided for the suspension of the Statute of Limitations in the Federal courts during the rebellion. (13 S. L., 123.) It follows that on that subject the law of a State is not the rule of decision.

The Statute of Limitations was suspended only by the act of Congress. Then (as shown in Mr. Barker's Brief, p. 40,) this action was barred on the 2d December, 1870, when the bill was filed.

JAMES LOWNDES.
For Appellant.

IN THE SUPREME COURT

OF

THE UNITED STATES.

WILLIAM GODFREY, RECEIVER, ET. AL., STOCKHOLDERS OF THE MERCHANT'S BANK OF SOUTH CAROLINA, AT CHERAW,
APPELLANTS,

vs.

HARVEY TERRY.

Appeal from the Circuit Court of the United States for the District of South Carolina.

No. 168.

ARGUMENT OF THEODORE G. BARKER,
FOR APPELLANTS.

CHARLESTON, S. C.
LUCAS & RICHARDSON, PRINTERS,
1877.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

WILLIAM GODFREY ET AL
vs.
HARVEY TERRY.

No. 168.

STATEMENT OF FACTS,

To accompany Mr. Barker's Brief.

1. The Merchants' Bank of South Carolina at Cheraw was chartered by the State of South Carolina 13th December, 1833. It was empowered expressly "to issue bills and notes as a circulating medium, and payable by the said bank in coin on demand; to receive and hold money on deposit; to make loans and discounts; to deal in exchange, foreign and domestic, and to transact generally such operations and business as legitimately belong to a banking institution."

It was made expressly liable to such regulations as the general assembly should at any time impose.

Sec. 14 of the charter provided: "That the said bank shall not issue any bill or note for the payment of money or commence discounting until one-third part of its capital stock, in specie, shall be deposited in its vaults."

Sec. 15 makes the bills or notes issued by the corporation and promising payment in money binding on the bank, and assignable and negotiable in like manner as if issued by any private person or persons.

Sec. 19 provides: "That the bills or notes of said corporation originally made payable on demand, or which

shall have become payable in gold or silver current coin, shall be receivable by the treasurers, tax collectors, solicitors, and other public officers in all payments for taxes or other moneys due to the State so long as said bank shall pay gold and silver current coin for their notes."

In the year 1840 an act was passed "to provide against the suspension of specie payments by the banks of the State of South Carolina."

Sec. 1 declared: "That the provisions of this act shall be and become part of the charters of every bank in the State."

Sec. 2 that "Every bank which shall suspend the payment of current coin for its notes, or which shall declare a determination to suspend or refuse payment of its notes according to their legal obligation in current coin, shall become liable to pay to the State of South Carolina at the expiration of every month after suspension or declaration, a sum of money at the rate of five per centum per annum upon the whole amount of its notes which shall have been issued or in circulation at the commencement of the said month, until the said bank shall revoke its declaration and shall lawfully redeem its notes when demanded according to their legal obligation."

A. A., 1843, Sec. V, imposes penalties against suspension of payment in coin and uses the expression: "Shall hereafter suspend the payment in legal coin of the bills and notes of the said bank issued by the said bank as part of the currency or circulating medium of the State."

A. A., 1853, recharters the Merchants' Bank of South Carolina at Cheraw, "subject to the provisions of the act of 1840 against suspension of specie payment."

A. A., 1853, Sec. ——, provided that "*in case of the failure of the said bank each stockholder, copartnership, or body politic having a share or shares in the said bank at the time of such failure, or who shall have been interested therein at any time within twelve months previous to such failure, shall*

be liable and held bound individually for any sum not exceeding twice the amount of his, her, or their share or shares."

2. The Merchants' Bank of South Carolina at Cheraw suspended specie payments at the same time with the other banks in the State; was so suspended in November, 1860, and never after resumed specie payments. (Record, p. 48, fol. 126.)

3. The said bank ceased to pay out its bills as soon as the Confederate currency began to circulate. The last time at which any of its bills were paid out was on the 6th August, 1861. (Record, p. 48, fol. 127.) The Confederate currency soon drove out of circulation all bills of the bank with those of other banks, and gold and silver ceased altogether to be used as currency or as a measure of value. There were no transactions with the bank but in Confederate money. (Record, p. 24, fol. 58.)

4. The paid-up capital of the bank was $400,000. (Matteson's testimony, Record, p. 46, fol. 113.) During the war the bank invested of its capital $48,830 in South Carolina war bonds and $464,700 in bonds of the Confederate States. These were bought mostly with Confederate money; about $50,000 of the first loan was paid for in specie. The bank's last dividend was in January, 1865, of $5 per share in Confederate money, "which nobody wanted scarcely." (Record, p. 46, fols. 121, 122 and 123.) The bank closed finally about the 1st March, 1865. (Record, p. 46, fol. 123.)

5. In 1870, William Godfrey was appointed receiver of the Merchants' Bank of South Carolina at Cheraw.

6. In his regular business as banker and broker the complainant, Harvey Terry, bought the notes and bills of the Merchants' Bank of South Carolina, as proved by him in this case, amounting to over $20,000, at prices ranging from twenty cents to five cents on the dollar of their face value. Most of these purchases were made in 1868 and 1869 at about fifteen cents on the dollar.

7. The Circuit Court of the United States for the district of South Carolina was held in Charleston 12th June, 1866. (Record, p. 48, fol. 123.)

8. Appellants (who were served with subpœna in this case) along with others (named in the bill as defendants but not served) were stockholders on 1st March, 1865, or within twelve months prior to that date.

IN THE SUPREME COURT OF THE UNITED STATES.

WILLIAM GODFREY AND OTHERS,

APPELLANTS,

vs.

HARVEY TERRY AND OTHERS,

APPELLEES.

BRIEF ON BEHALF OF APPELLANTS.

ABSTRACT OF THE CASE.

Analysis of the Bill.

Bill, filed 2d December, 1870, by Harvey Terry, Complainant, on behalf of himself and all other creditors of "The Merchant's Bank of South Carolina, at Cheraw," alleges the several Acts of incorporation, by which said Bank became vested with "the right to issue bills and notes, as a circulating medium, and payable by the said Bank in coin, on demand;" refers to the A. A. 20th December, 1853, by which it is provided, that "in case of the failure of the said Bank, each stockholder, copartnership, or body politic, having a share or shares in the said Bank, at the time of such failure, or who shall have been interested therein, at any time within twelve months previous to such failure, shall be liable and held bound individually for any sum not exceeding twice the amount of his, her, or their share or shares."

That on the first day of March, 1865 and indeed at an earlier date the said Bank had failed. * * *

2 That those holding shares in said Bank, or who had been interested therein, within twelve months previous to such failure, became liable for the debts of the said Bank, for sums not exceeding twice the amount of the shares held by them respectively. Annexes a list of the stockholders alleged to be such at the time of the said failure, with their respective quota of shares, as far as at date of filing of Bill had been ascertained.

Reserves to complainant the right to amend said list from time to time as other names of stockholders may be discovered; recites A. A., 13th March, 1869, which provides, "that

3 all Banks incorporated by authority of this State, and which have, by said authority, issued bills of credit, known as bank-bills, and have failed to comply with the said corporate privileges by refusing to pay their bills of credit and are now thus failing to comply with the provisions of Act of Incorporation in this particular, and shall so continue to violate such Act until 1st day of December, 1869, shall forfeit all corporate rights and privileges and are forbidden to transact any business as banking institutions."

That of the said bills of credit of the said Bank, or promis-

4 sory notes, payable on demand to bearer, and *constituting a part of the circulating medium intended to be furnished by the said Bank in accordance with its charter*, a large amount in the regular course of trade, and for valuable consideration, came to complainant.

Claims, that complainant "is entitled to have of the assets of the said Bank, if they be sufficient to discharge all its debts and liabilities, payment in full * * *," and "if the said assets are not sufficient, the proportion to which on a division of the same, to all the bill-holders and creditors,

5 complainant may be entitled, and * * *" is also entitled to payment of his debt out of the property of the various persons mentioned in the list appended and marked Exhibit "A," on their liability as stockholders of the said Bank at the time of its failure, or as persons interested therein at any time within twelve months previous to said

failure, according to the provisions of the Act of the General Assembly.

The bill claims to have an account of the assets of the Bank, and that the same be marshalled and applied to the discharge of the claims of creditors of the Bank.

And that complainant is entitled to pursue on the equity 6
side of the Court, the said stockholders,

To a full discovery of the facts as charged, and

To a full payment of his claim against said Bank out of the property of said stockholders of said Bank.

Analysis of Answer.

The defendants answering admit, that the Bank organized under Acts of the Legislature, as alleged, and issued its notes, which passed as money, under the patronage, encouragement and control of the State.

That the State made the provision, in the Act of 1853, for the liability of the stockholders in case of the failure of the Bank, and defendants say, that this was intended by the 7
State as one of the means of protecting the currency of the State, which almost wholly consisted of the bills and notes of this and other banks. That to this end the State made the convertibility of bank notes into specie, an essential ingredient of such issues. Defendants admit, that the Bank carried on business until some time in 1865, when its doors were closed. But, in admitting this, they by no means admit that the Bank was solvent up to the time of its closing. The Merchant's Bank of South Carolina had been in successful business up to the period of the late war, before the 8
happening of which event it suspended specie payments.

That the civil war deranged the whole currency of the country, and disturbed all values, and ended in the destruction of nearly every species of property.

That the bills of the Bank ceased early during the war to pass as money or currency, and became articles of mere commerce and speculation.

Defendants deny that the complainants took the bills, when they circulated as money, or as a specie circulation, or when they were redeemable in specie, or until long after they
9 had become mere articles of speculation.

Defendants deny that they are liable in any form to the plaintiff.

They deny, that in the Act or Acts of the General Assembly of the State, any liability is created or imposed, except in aid of the public policy of the State in maintaining the full value of the bills or notes of a bank or banks, while the same are in circulation as money, and to enable the State to have within its control the means of protecting those who might receive said bills or notes as part of the currency of the State, and gave value for them as the circulation of
10 specie-paying Banks of the State.

That such liability to the State arose, as was intended by the State, when a bank or banks refused to redeem the issues of notes and bills, in gold or silver coin, and by so doing failed in its obligation to the State, and to those who, at the time of such failure, were the holders and owners of such bills and notes, which, before that time, had been by them received as money.

Defendants deny, that by the Acts of the Legislature of the State is any liability created or imposed, or intended to be created or imposed upon the stockholders for notes and
11 bills, which have been obtained by purchase, after they had ceased to pass as money, or to circulate as bills or notes of a specie-paying bank.

Defendants deny that complainant has cause of action or is entitled to judgment as asked in the bill.

Defendants further say, that in 1861, the State of South Carolina engaged in war with the United States, in violation of the obligation of the Constitution, in consequence of which, much of the property, and assets of the said Bank became and were, wholly lost to the said Bank, to its creditors and stockholders, and that liability for losses so caused,
12 cannot be held to have been created or imposed, by the State, on the shareholders of said Bank, or intended to be enforced against them.

Defendants also say, that the Bank sustained further loss, by the refusal of the State to pay to the said Bank the sums of money for which the State was lawfully indebted to the Bank, which sums in amount would, if paid, be more than enough to satisfy the complainant.

Defendants, for a farther defence, deny, that the complainants have any claim against them, which is not barred by lapse of time.

Defendants farther deny, that any right of action is given by any Act or Acts of the General Assembly, and that com- 13
plainants have any right to maintain the complaint.

That in all cases of liability legally arising under said Section of the Act of Assembly, A. D. 1853, there being no person named, to whom, nor thing to which the stockholders, in case of failure of the Bank, should be liable; the liability can only be enforced by the State, or, in the name of the State, for the benefit of such person or persons as may be entitled to relief, or as may be designated specially by the State.

Defendants farther say, that a large part of the bills, or notes of said Bank, were issued after the suspension of specie 14
payment in 1860, and after the same had ceased to be currency, by the said Bank, unlawfully as a loan to the Confederate States Government to enable it to prosecute the war with the United States, and in the purchase of certain illegal securities issued by the Confederate Government in aid of the "rebellion," and that all such bills or notes were issued without legal consideration and unlawfully, in violation of the charter, and as obligations of the Bank, are void.

That the unlawful purposes and want of consideration and other circumstances connected with such bank notes were 15
matters of notoriety, and that all who received such notes or bills after 1860, took them with notice of such defects.

Assignment of Errors.

1. Complainant sues for his proportion of a fund to be created by a contribution of certain named parties (stockholders) to make up an alleged deficit of assets of a bank, and names the stockholders, whom he alleges to be liable, but the record fails to show service of his writ of subpœna upon the following contributing stockholders, who are alleged in the bill to be liable, along with defendants, and
16 are found to be owners of the respective number of shares at the date of alleged liability, to wit:

R. J. Barrett	84	Shares.
J. W. Barnes	20	"
Jane Campbell	64	"
Mary Little	20	"
Thos. S. Little	5	"
Thos. H. Harlee	64	"
J. J. Wilson	10	"
S. and W. Wallace, Executors	44	"
J. F. Isedbetter	43	"
J. C. Lyons	50	"
C. T. McFarlan	60	"
M. S. McCall	45	"
J. P. McCall	40	"
M. S. Martin	50	"
M. S. Martin, Trustee for M. A. Means	50	"
M. S. Martin, Trustee for S. M. Martin	50	"
John P. Little	148	"
John P. Little	10	"
B. F. Little	110	"
Mrs. H. K. Robbins	47	"
17 Miss H. K. Robbins	46	"
J. E. Robbins	46	"
B. D. Townsend	50	"
Allan McFarlan	500	"
A. B. Davidson	60	"
A. J. Johnston	16	"
O. H. Kollock	4	"
Robt. Latta	200	"

Ann Little	20	Shares.
Geo. W. Little, Trustee	5	"
L. D. Bennett	20	"
E. N. Stanback	40	"
S. W. Wallace, Trustee	90	"
Thos. P. Lide	7	"
Peter B. Lalane	20	"
Mrs. Jeannette McFarlow	60	"
Miss Jeannette McFarlow	71	"
W. R. Meyers	60	"
T. E. B. Pegues	300	"
T. C. Prioleau	6	"
T. Price	50	"

The defendants, who were selected by complainant and served with process, are thus deprived of the aid of the Court in this proceeding, in bringing before it all the necessary parties in ascertaining all the liabilities of the stockholders against whom proportionate liability is charged in adjusting the rights of all parties and in doing complete and final justice between them by a just distribution.

2. The order of reference (Record, p. 19, fol. 45) in requiring the master *pro hac vice* "to inquire and state to the Court who were the stockholders of the said Bank at the date of the failure thereof, as alleged in the said bill of complaint, to wit: on the first day of March, in the year of our Lord one thousand eight hundred and sixty-five, or at any time within twelve months previous to said date," did not follow the allegation of the bill; prejudged the question of "the time of failure," and assumed, without proper enquiry or proof, that the said Bank failed *on* said first day of March, A. D. 1865, and had not failed "*at an earlier day*," as alleged by complainant.

3. The question of "the time of failure," essential to the case, was never referred to the Master for enquiry, and his pretended finding of fact, (Record, p. 43, fol. 114,) that the Bank "failed on or about the first day of March, A. D. 1865," was without authority from the Court; was beyond the scope of the order of reference; and was without notice

to defendants, that a legal enquiry, as to "the time of failure" was ordered, and would be entered into before him.

4. Report of Special Master (if interpreted as finding the "time of failure" of the said Bank to be the first day of March, A. D. 1865, and that certain persons—stockholders
21 of said Bank—on that day and for twelve months prior thereto, are liable, by reason of such failure) assumed such to be the date of failure and of liability, without proof, and contrary to the testimony taken by himself and reported to the Court.

5. The Decree of the Circuit Court, in overruling defendants' exceptions, and in adjudging that the persons who held shares of stock in the Merchant's Bank of South Carolina, at Cheraw, on the first day of March, A. D. 1865, and who were interested therein within twelve months previous to the said first day of March, 1865, are liable and held bound,
22 is unsustained by proof, as to "the time of failure" of the Bank and of accrual of the liability of the stockholders.

6. If, by the Master's Report, or the Decree, the first day of March, 1865, is assumed as the date of the *insolvency* of the Bank, and, therefore, of failure in that sense, then the Decree, as well as the Report, in fixing the first of March, 1865, as the date of the happening of such insolvency is in direct variance with the proof (offered by complainant) which is, that during the war and long prior to 1st March, 1865, the Bank had become insolvent, by investing its whole capital of four hundred thousand dollars and all its surplus in
23 bonds of the Confederate States and in "War Bonds of the State of South Carolina," and had had, for many years previous to said date, no means of payment, but Confederate paper money.

7. The Decree, in assuming "the time of failure" to be the first of March, A. D. 1865, is, also, at variance with the admitted proof that "the Merchant's Bank of South Carolina, at Cheraw, suspended specie payments at the same time with the other Banks in the State, and was so suspended on the 29th November, A. D., 1860, when it failed to redeem its bills and notes, and never afterwards resumed specie pay-
24 ments." And is erroneous in not fixing the 29th day of

November, 1860, as the date of the failure of the Bank, there being no other proof equally distinct, by which a time of failure within the terms of the Statute could be ascertained.

8. The Circuit Court did not cause the assets of the Bank to be marshalled and applied to the discharge of the claims of complainant and other creditors of the Bank, as was prayed in the bill should be done, and which should have been done in advance of a Decree in favor of complainants against each and every one of defendants. The Decree was erroneous in giving judgment to complainants for more than 25
the balance of their claims, remaining unpaid after the assets of the Bank had been by proper proceedings ascertained and applied according to law to the liquidation of the obligations of the Bank, and in giving judgment and execution absolutely to the complainants, respectively, against the defendants individually, for a sum equal to twice the amount of the share or shares held by the defendants respectively, with no provision made for a distribution among complainants, of the sum to be collected, nor for a proportionate contribution among defendants to the sum of money to be levied 26
by complainants under their executions.

9. The Decree was erroneous in adjudging defendants to be liable to the creditors of the Bank, because the liability was to the State, and can only be enforced in the name of the State, either for its own benefit or for the benefit of those to whom the State might see fit, by its *legislation*, to appropriate the penalty; and no power exists in the Courts of the State, or of the United States, to make this appropriation and to give a right of action to individuals.

10. The Decree was erroneous in adjudging defendants to be liable to the creditors of the Bank, because the liability 27
of the stockholders, under the charter, was not made by the Statute a liability *for the debts of the corporation*, and cannot be construed, by implication, to be a liability to the *creditors* of the corporation, giving them an independent right of action, as creditors.

11. If the stockholders, without express words in the Statute making them *liable to the billholders* are still held, as

guarantors of the payment of the bills and notes, they were guarantors, only, to *bona fide* holders of such bills and notes, who received them, while they circulated as currency of a
28 specie-paying Bank, and while "constituting" (as is averred in this case by complainants) "a part of the circulating medium intended to be furnished by the said Bank, in accordance with its charter," and are not liable, as such guarantors, to those who purchased, after they were dishonored.

12. That the right of a *bona fide* holder of bank bills, received before suspension or failure, to claim against the guarantors of the Bank, is not negotiable by delivery after dishonor, and can only be transferred, by assignment, and
29 the purchaser must prove his title, as assignee, from one entitled to sue in the United States Courts.

13. That, if the stockholders are liable, as guarantors, they are liable for the failure of the Bank to pay, according to the Statute and according to the tenor of their bills and notes, that is to say, in coin, and their liability, as such guarantors, accrued upon the suspension of specie payments, and not subsequently.

14. That the bills of the Bank, proved as claims in this case, if they were lawfully issued promises of said Bank, must be presumed to have been issued before the suspension
30 of specie payments in November, 1860. That the notorious suspension of payment in coin was equivalent to demand upon and refusal by the Bank of all such issues outstanding at that date; the liability of the guarantors to the holders accrued when the Bank publicly announced its inability and refusal to pay in coin; and the Statute of limitations began to run from that date.

15. If the liability clause in the charter of the Bank be construed as creating a contract liability to the holders of the bills of the Bank the persons, who were stockholders,
31 at the date of its failure to pay its bills and notes in specie, (according to the tenor of the contract,) to wit: *the 29th November*, 1860, were then liable, and the right to sue upon the liability, which so accrued, was barred, by lapse of time, before the bill was filed in this case.

16. That if the 1st March, 1865, be assumed to be "the time of failure" contemplated by the Act, the stockholders were then liable, and their liability was barred, by lapse of time, before the ~~filing of the bill in this case~~ bringing of this action.

ARGUMENT.

First Ground of Error.

The omission of the complainant to serve the subpœna writ upon some of those who are charged as stockholders, and who are liable, as well as the defendants, to make good by contribution to the creditors of the Bank, the deficit of the Bank assets, is fatal to the enforcement of the equitable jurisdiction invoked in this case. 32

The omission of one party interested, involves the judgment of the Court which passes on the question affecting his right, without a hearing and involves, as to those defendants, who are adjudged liable, the loss of that aid, which each defendant has a right to ask of the Court, in compelling contribution from his co-defendants. 33

Pollard vs. Bailey, 20 *Wallace*, 525; *Crease vs. Babcock*, 10 *Metcalf*, 532; *Greer vs. Breed*, *Ib.* 575; *Mandeville vs. Riggs*, 2 *Peters*, 482; *Shields vs. Barrow*, 17 *How.*, 130; *Conn vs. Penn*, 5 *Wheaton*, 424; *Terry vs. Tubman*, 2 *Otto. p.* —; *Terry vs. Calnan*, 5 *South Carolina Reports*, *p.* 511.

Second Ground.

The order of reference (p. 19 Record, fol. 45,) is in these words:

"And it is further ordered, that it be referred to William Seabrook, Esquire, who is hereby appointed Master, *pro hac vice*, in this cause, to inquire and state to the Court who were stockholders of the said Bank at the date of the failure thereof, as alleged in the said bill of complaint, to wit, on the first day of March, in the year of our Lord one thousand eight hundred and sixty-five," &c. 34

The allegation of the bill (Record, p. 2, fol. 7,) is as follows: "That on the first day of March, A. D. 1865, *and indeed at an earlier date*, the said Bank had failed," &c. This allegation was not followed in the order of reference, in the *videlicet*, but on the contrary the words "indeed at an earlier
35 date" are wholly omitted.

That the order of reference prejudged the question of "the time of failure" and assumed the first day of March, A. D. 1865, to be "the time of failure" needs no argument. It not only directed no enquiry as to "the time of failure," but excluded from the consideration of the Master any other day, than the day assumed, in the order. It, in effect, decided, in advance of enquiry, proof, and hearing, that the Bank failed on 1st March, 1865, and had not failed (as alleged in the bill) "at an earlier date."

THIRD GROUND.

36 It is only necessary to read the order of reference above quoted to see, clearly, that an enquiry by the Master as to "the time of failure," was beyond the scope of the order, and that the order contained no notice to defendants, that such enquiry was to be had. It follows, that the Master had no authority to find "the time of failure" or date of liability, or what stockholders, at any particular date, *were liable*, and that his pretended finding is a nullity.

FOURTH GROUND.

If the Report of the Master could be considered as a Judicial finding of the fact, that the Bank failed on the first
37 day of March, 1865, it was without proof to warrant it. The proof, (adduced by complainant,) which accompanies the Report, was—

First—The testimony of Wm. Godfrey (Record, p. 45, fol. 119,) who had been, as he says, "President of the Bank for five or six years, up to the time of its close. The Bank closed *finally* about the first of March, 1865." This corresponded with the statement of the witness in his answer (Record, p. 23, fol. 54,) to the effect that the Bank "did business as a bank issuing bills and receiving deposits;" that

"this business was conducted for many years before the war, and *as far as it was practicable to do so with an irredeemable and constantly depreciating currency*, was continued throughout the war, until some time in 1865, when the Bank finally *closed its doors*." 38

Second—The testimony of John F. Matheson, (Record, p. 46, fol, 122,) to wit: "I was Cashier at the time of the final closing of the Merchant's Bank of South Carolina, at Cheraw, on or about the first of March, A. D. 1865. The Bank was a very good Bank up to the time of the commencement of the war, and stood high; but I doubt whether the Bank was solvent at the time of its final closing, on account of large investments in Confederate bonds." 39

The testimony, reported by consent of complainants, (Record, p. 47, fol. 125,) was—

1st—The Merchant's Bank of Cheraw suspended specie payments, in common with other banks in the State of South Carolina, on the 29th November, A. D. 1860, and never afterwards resumed specie payments.

2d—The said Bank ceased to pay out its bills as soon as Confederate currency began to circulate. The last time at which any of its bills were paid out, was on the 6th August, 1861. 40

Appellants contend, that the above testimony establishes the fact, that the Bank had failed, within the meaning of its charter, on the 29th November, 1860, when it failed to pay its bills and other liabilities in specie; and had become *wholly insolvent* long before the first March, A. D. 1865; and that the Report of the Master, (Record, p. 43, fol. 115,) that "the Bank failed *on*, or about, the first day of March. A. D. 1865," was not only without proof, but contrary to the testimony taken by the Master, and by him reported to the Court.

FIFTH GROUND.

It follows, from above analysis of the testimony reported, and from the fact that no other testimony was before the Court, at the hearing, that the Decree adjudging that the stockholders, "who held shares in the Merchant's Bank of 41

South Carolina, at Cheraw, on the first day of March, A. D. 1865, and who were interested therein within twelve months previous to said first day of March, 1865, are liable and held bound," is unsustained by proof "as to the time of failure" of the Bank and of the accrual of the liability of the stock-
42 holders.

SIXTH GROUND.

It also follows, from the testimony, that even if, in the Master's Report, or Decree, by "failure" is to be understood *insolvency*, and the first day of March, 1865, be assumed as the time when the *insolvency* of the Bank occurred, then the Decree, as well as the Report, is at variance with the proof, which is, that after 29th November, 1860, the Bank ceased to pay in coin; that its business, from that date and throughout the war, was carried on with "an irredeemable and constantly depreciating currency;" that in the opinion of its
43 officers it was insolvent long before it "finally closed its doors," and that it had become so during the war by its investments in Confederate States' bonds and War bonds of the State of South Carolina, long before the first day of March, A. D. 1865.

SEVENTH GROUND.

Was the date at which the Bank ceased to pay in coin "the time of failure" contemplated by the Statute?

This question has been so fully examined and so ably discussed in the Decree of the Circuit Court of South Carolina, in the case of *Donaldson vs. Bank*, that we adopt the
44 language of that Decree for argument on this head:

"In the determination of these questions, very little, if any, aid can be derived from the decisions made in other States upon analogus Statutes, and upon which so much reliance was placed by the plaintiff's counsel. The decisions turned, in a great manner, upon the peculiar phraseology employed in the charters to which construction was given, and which differed, in several essential particulars, from that used in the Statute now under consideration. In all these cases the charters not only imposed an individual liability
45 upon the stockholders, but designated, with great minute-

ness, the extent of such liability, the contingency upon which it should attach, the particular class of creditors for whose benefit it was imposed, and the mode of procedure by which it should be enforced.

Upon all these points the charter of the Farmers and Exchange Bank is entirely silent. It is couched in the most general and ambiguous terms. It declares that the stockholders shall be liable in case of "failure," but does not indicate, in any way, the meaning of the word "failure," or say to whom, or for what, they shall be liable. * * *

It is an established rule, in the exposition of Statutes, that 46
the intention of the lawgiver is to be deduced from a view of the whole and every part of a Statute taken and compared together.

When the general purpose of the Statute is thus ascertained, the language of its provisions must be construed with reference to that purpose, and so as to subserve it. If the words are not explicit, the intention is to be collected from the context, from the occasion, and necessity of the law, from the mischief felt and remedy in view. 1 *Kent*, 462.

Applying these principles to the case in hand, it appears to me, that the intention of the Legislature must be ascer- 47
tained by construing the 4th Section of Act of 1852, in connection with the 2d Section of the same Act, which incorporates into the charter the provisions of the Act of 1840. That Act, dictated by considerations of public policy, was intended to provide against the suspension of specie payments by the Banks of the State.

It provides, that if any bank "shall declare a determination to suspend, or refuse payment of its notes, according to their legal obligation, in current coin," it shall be liable to pay to the State, at the expiration of every month after 48
such suspension, or declaration, and during the continuance thereof, a heavy penalty, to be recovered by the State, in an action of debt. In order to preserve the banks in a safe condition and to prevent the currency from being debased, and the community defrauded, by an amount of bank bills in circulation disproportioned to the means of redeeming them, the Act required the President or Cashier of each

bank to make monthly returns on oath, setting forth, among other things, the bills in circulation, the specie on hand, and
49 the other resources of the bank.

From these provisions of the Act it is obvious that the leading object of the Legislature was to guard against the public mischief of an irredeemable circulation. By the Act of 1852, eleven banks were about to be incorporated, each of them clothed with the right to issue their bills or notes, intended to be circulating currency, or medium of exchange, instead of gold and silver. Against bills thus put in circulation, a very disastrous experience had recently shown that the community had no practical means of protecting themselves. * * * * * *

50 These two sections are *in pari materia;* they relate to one subject, are governed by one spirit and policy, and are consistent and harmonious parts and provisions in one system. They must, therefore, be construed together, and, so construed, lead irresistably to the conclusion that the "failure" referred to in the fourth section, is a failure on the part of the bank to pay its notes, "according to their legal obligation, in current coin." And this conclusion is confirmed by the language used. The liability of the stockholder is made to depend, not upon the insolvency of the bank, (its inability to
51 pay its debts,) but upon its "failure," or "suspension of payment."

This is the definition of the work "failure," given by Worcester and other lexicographers, and, in this sense, the context shows that the Legislature intended to use it. If this be not the true construction of the Act, it is difficult to say in what sense the Legislature could have used the word failure. If the Bank did not fail when it refused, or was unable to satisfy its engagements in money, as they became due, when did it fail? Was it when the whole mass of its means, including property of evey description, could not, by any
52 possibility, or in any event, be made adequate to the liquidation of its existing debts? This construction would make the failure of the Bank equivalent to its total insolvency, and would render the liability imposed on the stockholder a security of little value to the creditor, who would have no

means of determining the precise time at which this condition of things was reached, and who, without this knowledge, would be unable to determine against what stockholders to bring suit. From the allegations in the complaint, the plaintiffs' view appears to be, that the failure of the Bank took place in 1865, when it closed its doors and ceased, practically, 53
to exist; but there is nothing in the charter to warrant the conclusion that the Legislature intended to suspend the creditors' right to enforce the statutory liability of the stockholder until the insufficiency of the assets of the corporation was made to appear, either by the Bank's voluntarily going into bankruptcy, or judgment recovered, or execution issued against it.

The plaintiffs' construction is open, too, to the further objection, that it would enable the Bank, by keeping up the semblance of business, or the creditor, by delaying suit, to 54
shift the liability, arbitrarily, from one set of stockholders to another. Such a provision would be unreasonable, and a construction which would lead to such a result should not be given to the Act, unless absolutely necessary to give it effect; and, in my opinion, it is not required, and would be inconsistent with its whole scope and design." 4 *So. Ca. Rep.*, (*N. S.*) 106.

The word failure, we have seen, unless controlled by the context, means "a suspension of payment." In South Carolina, before 1861, the only "payment," in law, or legal tender, was in coin. A "suspention of *specie* payment" therefore, 55
it must be assumed, in legislative parlance, was synonymous with "suspension of payment," or failure. Failure is not synonymous with anything else. It is not synonymous either with *insolvency*, or *bankruptcy*. "Insolvency," says Crabb, "denotes a state, namely, the state of not being able to pay what one owes. Failure signifies the act of failing in one's business. Bankruptcy necessarily implies a failure, yet it does not necessarily imply insolvency; for some men may, in consequence of a failure, be lead to commit an act of bankruptcy, who are afterwards enabled to give a full 56
dividend to all their creditors."

Bouvier defines failure "a suspension of payment," "a

neglect to fulfill commercial pecuniary engagements," and he adds, "according to the French Code of Commerce, every merchant or trader who suspends payment is in a state of failure." *Bouvier L. D., Vol.* 1, *p.* 554.

Worcester says, under the head of bankruptcy: "Failure is a suspension of paying debts; insolvency, the inability to pay them."

57 In *Re* Chandler, 4 Bank Reg. 66, Lowel J. says: If a trader allows his paper to go to protest, he is said to have failed, or to have suspended; the expressions are used as equivalent."

But the matter, we think, has been put beyond argument by judicial construction in South Carolina, where it has been adjudged by the Court of Errors, in the case of the State *vs.* The Bank (1 *Speers, So. Ca., Rep. p.* 433,) that

"A general refusal by an incorporated Bank to redeem its issue and deposits in gold and silver coin is, *per se*, a suffi-
58 cient cause of forfeiture of its charter."

In the language of the learned Judge, who delivered the opinion of the Court (*Richardson J.*)

"Men may call this suspension, or compromise. But the resolution to suspend specie payment, coupled with the fact that the Bank avoided payment, when demanded, constituted refusal to pay, and an abuse of the great end and prime policy of its charter. * * * * * That gold and silver coin constitute the measure of all values, and the only legal tender in payment of debts; and that bank bills
59 represent such coin, but only while they are secured in the payment of such coin.

From such unquestionable propositions, we deduce these conclusions, as a necessary consequence—that such a bank is bound to pay its bills, and return its deposits of money, as a consequence of reason and law, though not by the expression of its charter—that such payments must be in gold and silver coin by virtue of the Constitution. * * * And finally, that a deliberate and wilful resolution to suspend such payments, accompanied by actual refusal to pay * * constitutes an explicit abuse of the trust of the Bank
60 Charter, and, therefore, it is subject to forfeiture at the demand of the State."

The conclusion is irresistible, that the 29th November, A. D. 1860, the date of the public and general suspension of specie payments by the Bank, was "the time of failure" within the meaning of the charter, at which the alleged liability of the stockholders to the creditors accrued, if it accrued at all, and, consequently, those persons, and those only, who were stockholders at that date, and for twelve months previous, were the proper parties defendant.

EIGHTH GROUND.

The equitable jurisdiction invoked in this case, is thus stated in the bill, (Record, p. 3, fol. 11,) "In virtue whereof your orators are entitled to have of the assets of the said Bank, if they be sufficient to discharge all its debts and liabilities, payment in full as well of the principal as of interest; and *if the said assets are not sufficient*, the proportion to which, *on a division of the same* to all the bill-holders and creditors, your orators may be entitled; and in virtue whereof your orator is *also* entitled to payment of his debt out of the property of the various persons mentioned in the list appended, and marked 'Exhibit A' on their liability as stockholders of said Bank, &c. * * * That for the reasons and facts aforesaid your orator charges, that he is entitled to have an account of the assets of the said Bank, and that the same shall be *marshalled* under the directions and decree of this Honorable Court, and *applied to the discharge* of the claims of your orator and other just creditors of the aforesaid Bank, and that your orator is entitled to pursue, on the equity side, of this Court, the said stockholders," &c. 61 62

The prayer of the bill follows the stating and charging part, thus, (Record, p. 4, fol. 16,) "That an account may be taken of the assets of the said Bank, and that the same may be administered by this Honorable Court, and applied to the payment in due course of law, of the bill-holders and other creditors of the said Bank," &c. 63

The jurisdiction, thus invoked, was in accordance with the decisions and practice of this Court, in like cases. (Pol-

lard *vs.* Bailey, 20 Wallace, p. 525; Terry *vs.* Tubman, 2 Otto, p. 156; Terry *vs.* Bank of Alabama, Ib., p. 454; Carroll *vs.* Green, Ib., p. 509.)

The Supreme Court of South Carolina, in a similar case as the present, (Terry *vs.* Calnan, 5 S. C. Rep., p. 511), in
64 which the Statute corresponding to the one under consideration in this case was construed by the Court, thus held:

"The form of the complaint, as to the parties, is not reconcilable with any claim to relief but such as can be granted, through the equitable jurisdiction of the Court. * * * The Receiver of the Bank is made a defendant, and judgment demanded against him in that character for the whole amount of the indebtedness claimed by the plaintiff. * * * He is here a proper party, because *the assets in his hands must be applied in aid of the stockholders to diminish, to the*
65 *extent they may avail, whatever liability the charter may have imposed on them, on the equitable principle, that if the stockholders are liable for the debts of the corporation, its property is to be administered, in their aid, to lighten the burden which may fall upon them.*"

It is proper here to note that the main questions as to alleged liability of stockholders, in the South Carolina Bank charters, have not yet been decided. It has, so far, only been adjudged, that "if the stockholders are liable," the proceeding must be through the exercise of the equitable
66 jurisdiction of the Court, as above stated.

In Carroll *vs.* Greene, 2 Otto, p. 512, the opinion of this Court is to the same effect: "The remedy against the stockholders was necessarily in Equity. (Pollard *vs.* Bailey, 20 Wallace, 521.) They were severally compellable to contribute according to the amount of stock they respectively held, and the liabilities of the Bank to be met after exhausting its means, the maximum of the liability of each stockholder not to exceed, in any event, twice the amount of his stock."

67 The Circuit Decree, rendered in this cause, does not conform with the case made by the bill, and much more nearly resembles a judgment at law—in an action of debt for a penalty, where the right of a named plaintiff to sue a par-

ticular defendant, for a specific sum, had been expressly given by the words of a Statute.

NINTH GROUND.

It has been ably contended by some distinguished lawyers, that the clause in the Bank charter, which declares "that in case of the failure of the Bank, each stockholder, copartnership, or body politic, having a share or shares in such Bank at the time of such failure, or who shall have been interested 68
therein at any time within twelve months previous to such failure, shall be liable and held bound, individually, for any sum not exceeding twice the amount of his, her, or their share or shares," creates *a penalty* for which such stockholders, in case of such failure, shall be liable and held bound to pay the amount named *to the State*, when demanded.

It is true that the Act does not say liable and held bound *to the State*, or liable and held bound *to pay to the State.*

Neither, on the other hand, does it say liable and held bound *to the creditors of the Bank*, or *to the holders of the* 69
bills or notes; nor liable and held bound *to pay to the creditors*, or *to the bill holders.*

So far as the words go, the two theories of construction, to wit: the theory of a *penalty to the State* and the theory of a *contract liability to the creditors or bill holders*, stand equally unsustained, by the express words of the Charter; and the Courts are left to surmise what was the latent intent of the Legislature, and to supply words to complete the text of the Act.

Appellants here contend, that it would be a dangerous 70
stretch of Judicial power for the Courts to assume one or other supposition to be correct, as to the intention of the Legislature, or to adopt any supposition not sustained by the most conclusive probability. Especially is this the case where the Courts are at liberty to escape from so difficult a position, as that of supplying words not in the Statute, and would be justified in deciding, that in the South Carolina Bank charters (*unlike those of other States*) the Legislature has failed to accomplish its possible or probable intention,

71 or *that further legislation* is necessary to effectuate the supposed intention: or, that the Legislature intended to reserve to itself the control over the threatened liability, or penalty, and to enforce or release it, according to its future will, at the proper time and under the proper circumstances.

Should the Court, however, reject all of these suggested constructions of the South Carolina charters, and take the responsibility of deciding, whether the Act created a penalty to the State, or, a contract liability to the creditors or to the bill holders, then appellants say, that the theory of a penalty
72 to the State is much the more reasonable construction of the Statute; and that the Court, in construing the clause by implication, in the absence of express words; in assuming the probable intention, and in supplying words in the charter, would have to go much farther, in order to reach the conclusion, that the Statute created and vested in the creditors or bill holders a contract obligation, with a right of action, against the stockholders, then it would have to go, in order to determine the forfeiture imposed to be a penalty to the State, and this, because—

73 1. The clause itself, as part of the charter of the Bank, is, a term of the State's contract with those, who were to become corporators of the Bank. To this contract, the contracting parties were the State on the one side, and the stockholder on the other. Whatever duty or obligation was stipulated for by the State, and not prescribed, by the terms of the contract, expressly, as a duty from the corporator to some third party (not a party to the contract,) must be presumed to be a duty from such corporator *to the State.* Nothing short of express words could prevent this necessary
74 and natural implication in all contracts, viz: that all obligations set forth in the contract must be presumed to be obligations to the party stipulating. So that, when the State stipulated with the stockholders, that, in a certain event, the shareholder, as an individual, should be "liable," without expressly stipulating *to whom*, the legal presumption is, that the liability, intended by the State, and accepted by the stockholder, was *to the State.*

2. Because the theory, upon which the statutory liability has been usually construed to be a contract liability to the creditors of the Bank in the event of failure, is, that, as to such individual liability of the stockholders, the clause is to be deemed an exception to the incorporation. That the act of incorporation, otherwise, limits the liability of the members of the corporation to the capital or common fund of which they are shareholders, and that to the extent of such exception the liability clause leaves them exposed *as co-partners*, to personal liability, in event of a deficit of assets. Such was the theory of Judge Curtis, in argument, in the case of Hawthorne *vs.* Calef. 75

And such also was the theory of the Court in the case of Corning *vs.* McCullough.

But, the theory wholly fails, when applied to the South Carolina Statute. 76

Supposing the word failure to mean insolvency, the theory of qualified partnership liability would have been maintainable, had the Legislature said, that, *all* "the stockholders, in the event of failure, should be liable," &c.; then, they, who were shareholders, at the time of insolvency, would be liable to make up, individually, the deficit of assets, to the extent of the exception in the incorporation. But, the South Carolina charters provide, that, in the event of failure, not only those shall be liable, who are corporators, when the failure takes place, but also those, who might happen to have been stockholders, at any time within twelve months previous thereto. 77

The liability, so imposed upon two distinct classes of persons, must be held to be the same sort of liability, as to either class, whatever sort of liability it may be.

It clearly cannot be held to be a partnership liability as to those, who, within twelve months previous to insolvency, had been shareholders, but who had ceased to be such before the insolvency occurred. As to these, the supposed liability at date of failure could not be the individual liability of partners to make up a deficit of partnership assets, because they had ceased to be copartners twelve months before the failure occurred. If then, those who had withdrawn from the 78

corporation, within twelve months before failure, could not be made liable, as copartners, within the exception in the charter, so the *other* class of stockholders, who were stockholders at date of failure, and who, by the Statute were made liable, on the same footing and in the same manner with the former, cannot be held liable as copartners, and the
79 theory of partnership liability fails, also, as to them.

3. The *only* other ground, upon which the liability of the stockholders could be held to be a contract obligation with creditors or bill holders is, *that it has been so created, by the words of the Statute.*

In such cases, the Courts have always found, in the Statutes, the necessary words, creating the obligation or legal tie of the stockholders, with the creditor, or, with the bill holder, according to the wording of the Statute.

The South Carolina Statutes, as will be shown, are wanting, altogether, in the words necessary to connect by privity
80 of contract, or privity of action, the stockholder with the bill holder, or the creditor.

It is not unreasonable, therefore, to conclude, that the Legislature of South Carolina intended to hold out the threat of liability, in the event of failure, suspended over the heads of the stockholders for the protection of a sound currency, but reserving to itself the control of the liability *as an unappropriated penalty* which it might enforce, in the event of an abuse of the charter by the corporators, and, then, by the proper legislation, appropriate it, for the benefit of the party grieved, or else release it, in case the corpora-
81 tion should be shipwrecked by revolution, or overtaken by *vis major*, or in case of a failure, or insolvency, occurring from any other cause, beyond the power of individual corporators to control or prevent.

And, in no event, will the Court, especially a Court of Equity, strain a clause of doubtful import, so as to give effect to a penalty, or something in the nature of a penalty, or forfeiture, against innocent parties, so as to subject them to deprivation of their property in favor of one, who claims the "letter of his bond" and under a condition of things,
82 which the Legislature, in its contract with the stockholders.

could never have contemplated, as the condition and circumstances under which the penalty should be enforced.

If the legislation be defective in carrying out an intention partially indicated, it is not within the power of the Courts to supply defects in the Statute.

If it be a penalty unappropriated, or a liability only threatened, and still within the control of the State to enforce, modify or release it, such appropriation, enforcement, modification or release must be made by the Legislature; and the Courts are powerless to appropriate the penalty to any particular individuals or classes, or to say to whom the 83
stockholders are liable, and above all to vest in any persons or classes the right of action for either penalty or liability.

Tenth Ground.

The construction of the statute, which would make the stockholders not merely liable for the forfeiture, but liable *to the creditors of the Bank*, necessarily, proceeds, in the absence of any mention of such creditors, upon reasoning, by implication, from presumed intention of the Legislature.

Laws are construed strictly to save a right or to avoid a penalty. Bacon's Abr. Tit. Stat., 9 p.

"A penalty must be created by express words and cannot 84
be raised by implication." Bacon's Abr., Tit. "Statute."

Such reasoning, in construction of statutes, is not resorted to by the Courts, without great caution, and is adopted only where the presumed intention is plainly indicated.

Dwanis on Statutes, 562, Ib. 564.

"It was observed by Richardson, (arguendo) 4 Maul & Sel, 118, that such construction by equity might well obtain formerly when the Legislature was used to express its intention, sparingly, in a few words or sentences only; but in modern times, since it was the practice to express the 85
intention fully and at large, such construction was unnecessary and dangerous. And Lord Tenterden, in a late case, said "There was always danger in giving effect to what is called the Equity of a Statute." 6 Barn & C., 475. Bacon's Abr. Tit. Statute, 6, (a.)

"The rules of the common law will not suffer the general words of a statute to be restrained to the prejudice of a person upon whom a penalty is inflicted." Ib. 9.

In order to hold, under the South Carolina charter, the stockholder became liable to the creditor or to the bill-holder, the Court must resort to a very forced construction
86 of the statute, in favor of the creditors of the Bank.

It must undertake to declare, what the *unexpressed intention* of the Legislature was, in the clause of the charter in question.

It must decide that the intention of the Legislature was *not* to provide a liability, in case of failure of the Bank, from the stockholders, *to the State.*

It must assume, that the Legislature did *not* intend to reserve to itself the control and disposition of this liability or penalty.

It must hold, that the liability, *threatened* in the charter,
87 was, not only imposed and *enjioned* upon the stockholder, but also *vested* in the creditor or billholder.

It must decide, that no farther legislation was necessary to appropriate the liability, or penalty, so provided, and that *the courts* may appropriate the penalty to those, who, they may decide, shall be entitled to it.

To reach this conclusion, it must by construction, upon presumed intention, imply words not in the statute. It must supply, what was not left to implication but plainly expressed in the statute of Maine, upon which the case of
88 Hawthorne *vs.* Calef, 2 Wall., 10, was decided, and after the words "liable" insert by construction the important words "*for the debts of the Corporation*," which are not in the South Carolina Statute.

In *Hawthorne vs. Calef*, the Court having, in the statute before it, those words "liable for the debts of the corporation", repeated in two separate clauses, and other words, in two or more clauses, which subjected the property of the stockholder under separate judgment and execution against him, individually, to pay *the debts* of the corporation, was able, without using violent construction, to imply the intended
89 relation of *debtor*, and to say "we think that the case falls

within the principle of *Woodruff vs. Trapnal*, (10 How 190,) and *Curran vs. State of Arkansas*, (15 How. 304,)", and, also, of *Corning vs. McCullough*, 1 Comstock, 47.

In all of these cases, the necessary words were enacted, which sustained or justified the implication, of contract relation and privity.

In *Woodruff vs. Trapnal*, "the charter of the Bank provided that the *bills* and *notes* of the institution should be *received in all payment of debts due to the State*", and the court held, that the clause of the charter constituted with the *holders of* the *bills* and notes a contract on the part of the State. 90

In *Curran vs. Arkansas*, " the Charter of the bank contained a pledge, or *assurance*, that *certain* funds deposited therein should be *devoted* to the *payment* of its *debts*. It was held by the court that this constituted a contract *with the creditors*"—and so it was in *Furman vs. Nichol*, 8 *Wallace*, 44.

We have already shown that, in *Corning vs. McCullough*, the statute was "that the stockholders of the corporation shall be *jointly* and *severally personally liable for the payment* of *all debts* and *demands contracted* by the corporation, and that any *person* having any demand against such corporation, 91 *may sue* any *stockholder*, or director, in any *court* having cognizance thereof, and *recover* the *same* with costs."

This example of a liability, completely provided, by express enactment, *from* the *stockholder*, for the *payment* of the *debt* of the corporation, and appropriated *to* the *creditor*, together with the authority, expressly conferred, by the legislature upon the courts, to furnish the remedy, expressly given to such creditor, by suit against the stockholder directly, fully illustrates, how much the court will have to do, by construction, in case it assumes the burthen of supplying the words 92 which are wanting in the South Carolina Charter.

Under the authority of *Hawthorne vs. Calef*, we admit, that if the liability, here, had been *decleared to be for the debts* of the corporation, and the property of the stockholder had been also *declared* liable for such *debts*, that the court would imply the contract relation and privity between the stockholder and the *creditor* of the Bank; but we cannot suppose that, in order to raise such implication, the Court will supply

words not in the South Carolina Act, and the essential words which connect the stockholder with the *creditor* of the Bank,
93 viz: "the debts of the Bank." If the Court ventures upon the dangerous ground of implying words not in the charter, it is difficult to imagine, upon what ground it will imply the the words "for the debts of the Bank, ' rather than the words "bills and notes of the Bank." The argument, from the great end and object of the State, in providing, through these banks of issue a safe currency, and fortifying it by the liability of the stockholder, would seem to justify the insertion of "bills and notes," rather than "debts,"and would more rationally sustain the implied liability to the billholder, than that to
94 the creditors generally.

ELEVENTH GROUND.

Should the Court so far strain the language of the charter and say, that the stockholder, because declared liable, is, therefore, liable *to the billholders*, in the event of failure, and should the Court say,that such liability is, as upon a contract of guaranty, we contend that such guaranty should not be construed to be a guaranty beyond the equity of the statute, or of the case arising under it.

Whether the Legislature intended to hold out a threatened penalty over the heads of the stockholders, or to provide a
95 contract liability for the creditors generally,or for the billholders as such, it is clear, that the purpose was to protect such billholders, only, as might *bona fide*, in the course of trade, receive, as part of the State currency, the bills of her banks, while payable in specie, and, in the language of the plaintiffs' bill, "constituting in part the circulating medium intended to be furnished by the said Bank in accordance with its charter."

After repudiation of the payment of the bills in specie by the banks; after they ceased to *circulate* as money; after the insolvency of the Bank; after the assets were finally ex-
96 hausted; after, in correspondence with such destruction, the bills had sunk to the point, when their only market value was the money-changer's estimate of the chances of litigation, in these suits; the purpose of the guaranty, if such

were intended by the Legislature; the equity of the Statute; as well as the equity of the case, originally contemplated between the guarantor and the person, injured by the failure of the Bank, had entirely ceased. With it ceased, also, the liability of the stockholders.

At the time of "failure," at the date of suspension, when the bills ceased to circulate as money, their character at once 97
changed. The suspension of specie payment in 1860 was notorious. It was recognized as a fact by the Legislature of the State. The entire commercial world, who had been receiving the bills previously as currency, were informed of the fact of suspension. The act of suspension by the Bank was a public and general waiver of demand, and proclamation of refusal to pay the bills *according to their tenor*. They stood, from that day, as dishonored paper. Like a note of an individual payable on demand, the Statute of Limitations began to run from date of refusal, whether upon demand, or 98
waiver of demand. *Terry vs. Tubman*, 2 *Otto*, 156.

The *bona fide* holder who had received them as currency before the 29th November, 1860, could at any time within four years after that day, have filed his bill against the Bank, and made the question, now made, as to the liability of the stockholder as guarantor. The Bank was liable upon the paper—the stockholder upon the case made upon the Statute. If the stockholder, in a suit so brought, could have shown that the bill holder had received the bills from the counter of the Bank, issued *after* declaration of suspension, the de- 99
fence was complete, because the contract was with the Bank upon its *delivery*, lawfully, according to its charter, of the promise to pay. That which distinguishes a bank note from other promises to pay on demand is, that it is supposed to be issued and re-issued. It has been ruled, that every new issuing by the Bank is a new contract, dating from date of such issue, and, therefore, that the cause of action does not begin at the date of the bank note, but at date of issue and *presumed* re-issue. This date is presumed to continue, as long as the Bank continues to pay its bills, according to their 100
tenor, and according to law. The alleged guaranty, if it be a contract, would be presumed likewise to be a continuing

one, as long as the Bank continued to redeem its notes, in coin, according to its charter and the law.

The moment, however, the Bank declared its intention not to redeem its bills in coin, it ceased to act under the powers conferred upon it by its charter. Its Directors lost the authority in law to issue its bills—that authority was, *expressly* by the charter, to issue bills payable on demand in
101 coin—all issues of bank notes by them subsequent to suspension were *ultra vires*. It was only to the ultimate payment of the bills issued by the Bank, *within its charter powers*, that the Legislature can be held to have intended to make the stockholders liable, and only upon a promise (lawfully made by a lawful delivery) to pay on demand in coin, that the guarantor can be held to have bound himself.

What does the Bank virtually say in every issue, or presumed issue of its bills, after declared suspension? "I give out again the promise to pay, but I am not acting in accord-
102 ance with my charter; I am not paying my bills according to their tenor, or according to my charter, in coin, and I do not bind myself, hereby, to pay in coin. You need not demand payment in coin. In advance, I refuse payment, and I waive demand." The persons, who receive such bills, as well as those, who voluntarily take the position of one, who has so dealt with the Bank, or is presumed in law to have so dealt, can have no claim on the guarantor, upon, or in accordance with, the charter.

If such defence by the guarantor would have been good,
103 upon proof, against the bill holder, who took the bills, from the Bank, after notorious suspension of payment—still more would it be good against an avowed speculator, who purchased them, not as circulation, but as dishonored paper, of broken banks, eight or nine years after dishonor, and after they had wholly ceased to circulate as money, or to be issued by the bank.

The utmost that such a purchaser could claim against the insolvent Bank itself, would be what was paid for the bills. He could only prove, along with the other creditors, against
104 the assets for that sum.

If he intended to secure by his purchase the previous

holder's claim, upon the stockholder, under the Statute, two precautions should have been taken by him, viz:

1. To ascertain whether the previous holder had received the bills, while circulating as money and payable on demand in coin, in good faith, and in course of trade, and *not* from the Bank after suspension, and to secure himself with the means of proving such title, and

2. To take from such *bona fide* holder in writing an assignment of such holder's right of action against the stockholders. 105

If the Court should construe the liability of the stockholder to be a guaranty of their payment, and that such engagement, under the Statute, entered into, and became part of the bills of the Bank, when lawfully issued, and while negotiable, and that the guaranty thus was also negotiable; by the same rule, then, the guaranty ceased to be negotiable, when the bank bills *were dishonored* and ceased to be negotiable, as bank notes.

This occurred when the Bank refused or ceased to redeem its bills. (*Kimbro vs. Bank of Fulton*, 49 *Ga.*, 421. *Terry vs. Tubman*, 2 *Otto, p.* 156, *vol.* 92, *U. S. Sup. Ct., March*, 106 1876.)

Twelfth Ground.

The validity of a bank note, depends upon its being lawfully issued by a Bank authorized by law to make such issues.

If not issued in strict accordance with the terms and conditions of its charter, it is an unlawful promise, and cannot be enforced at law, as a contract of the Bank.

If the Directors, who sanctioned its issue, could be held responsible for the fraud practiced upon the public, such responsibility could not render the illegal promise, valid.

If the corporation could be made to respond to the par- 107 ties deceived by the Directors, as agents of the corporation, in an action at law, or in Equity, such Judgment, or Decree, would go only against the corporation and affect only its assets.

one, as long as the Bank continued to redeem its notes, in coin, according to its charter and the law.

The moment, however, the Bank declared its intention not to redeem its bills in coin, it ceased to act under the powers conferred upon it by its charter. Its Directors lost the authority in law to issue its bills—that authority was, *expressly* by the charter, to issue bills payable on demand in
101 coin—all issues of bank notes by them subsequent to suspension were *ultra vires*. It was only to the ultimate payment of the bills issued by the Bank, *within its charter powers*, that the Legislature can be held to have intended to make the stockholders liable, and only upon a promise (lawfully made by a lawful delivery) to pay on demand in coin, that the guarantor can be held to have bound himself.

What does the Bank virtually say in every issue, or presumed issue of its bills, after declared suspension? "I give out again the promise to pay, but I am not acting in accord-
102 ance with my charter; I am not paying my bills according to their tenor, or according to my charter, in coin, and I do not bind myself, hereby, to pay in coin. You need not demand payment in coin. In advance, I refuse payment, and I waive demand." The persons, who receive such bills, as well as those, who voluntarily take the position of one, who has so dealt with the Bank, or is presumed in law to have so dealt, can have no claim on the guarantor, upon, or in accordance with, the charter.

If such defence by the guarantor would have been good,
103 upon proof, against the bill holder, who took the bills, from the Bank, after notorious suspension of payment—still more would it be good against an avowed speculator, who purchased them, not as circulation, but as dishonored paper, of broken banks, eight or nine years after dishonor, and after they had wholly ceased to circulate as money, or to be issued by the bank.

The utmost that such a purchaser could claim against the insolvent Bank itself, would be what was paid for the bills. He could only prove, along with the other creditors, against
104 the assets for that sum.

If he intended to secure by his purchase the previous

holder's claim, upon the stockholder, under the Statute, two precautions should have been taken by him, viz:

1. To ascertain whether the previous holder had received the bills, while circulating as money and payable on demand in coin, in good faith, and in course of trade, and *not* from the Bank after suspension, and to secure himself with the means of proving such title, and

2. To take from such *bona fide* holder in writing an assignment of such holder's right of action against the stockholders. 105

If the Court should construe the liability of the stockholder to be a guaranty of their payment, and that such engagement, under the Statute, entered into, and became part of the bills of the Bank, when lawfully issued, and while negotiable, and that the guaranty thus was also negotiable; by the same rule, then, the guaranty ceased to be negotiable, when the bank bills *were dishonored* and ceased to be negotiable, as bank notes.

This occurred when the Bank refused or ceased to redeem its bills. (*Kimbro vs. Bank of Fulton*, 49 *Ga.*, 421. *Terry vs. Tubman*, 2 *Otto, p.* 156, *vol.* 92, *U. S. Sup. Ct., March*, 106 1876.)

Twelfth Ground.

The validity of a bank note, depends upon its being lawfully issued by a Bank authorized by law to make such issues.

If not issued in strict accordance with the terms and conditions of its charter, it is an unlawful promise, and cannot be enforced at law, as a contract of the Bank.

If the Directors, who sanctioned its issue, could be held responsible for the fraud practiced upon the public, such responsibility could not render the illegal promise, valid.

If the corporation could be made to respond to the par- 107 ties deceived by the Directors, as agents of the corporation, in an action at law, or in Equity, such Judgment, or Decree, would go only against the corporation and affect only its assets.

The unlawful issue would not affect the sureties or guarantors of the bank's lawful obligations. Their implied contract (if a contract be implied) is to be specifically liable, according to the express terms and within the express limits of the charter; that is, for the bills or notes lawfully issued.

Sec. XIV. (of the Charter of the Merchant's Bank of South
108 Carolina at Cheraw, passed in the year 1833,) provided "That the said Bank shall not issue any bill or note for the payment of money, or commence discounting until one-third part of its capital stock, in specie, shall be deposited in its vaults." * * * *

By the XVI., the bills or notes issued by order of said corporation, are made binding upon the Bank, and are made assignable and negotiable also, but only the bills or notes "promising the payment of money."

At that date, the only "payment of money" or legal ten-
109 der known to the law in South Carolina, was payment *in gold or silver coin.* Hence the only bills, or notes, made obligatory on the Bank, and assignable or negotiable, by the charter, were bills or notes "promising payment" in gold or silver coin.

Sec. XIX., provides, "That the bills or notes of said corporation, originally made payable, on demand, or which shall have become payable, *in gold or silver current coin*, shall be receivable by the treasurers, tax collectors, solicitors, and other public officers, in all payments for taxes, or other monies due to the State, *so long as said Bank shall pay gold*
110 *and silver, current coin*, for their notes."

In the year 1840, an act was passed "to provide against the suspension of specie payments by the banks" of the State of South Carolina.

The first Section declared, "That the provisions of this Act shall be and become part of the charters of every bank" in the State.

The second Section provided that "Every bank which shall suspend *the payment of current coin for its notes*, or which shall declare a determination to suspend or refuse
111 *payment of its notes according to their legal obligation, in current coin*, shall become liable to pay to the State of South

Carolina, at the expiration of every month after suspension or declaration, a sum of money, at the rate of five per centum per annum upon the whole amount of its notes, which shall have been issued, in circulation, at the commencement of the said month, until the said Bank shall revoke its declaration, *and shall lawfully redeem its notes when demanded, according to their legal obligation.*" * * *

In 1843 the Legislature made a farther conspicuous interpretation of the charters of the banks, as to their legal obligation to pay their bills or notes in coin. 112

The fifth Section uses the expression "shall hereafter suspend the *payment in legal coin* of the bills and notes of the said Bank, *issued by the said Bank as part of the currency or circulating medium of the State.*"

In 1853, the Merchant's Bank of South Carolina, at Cheraw, "was re-chartered with all the rights under its old charter and subject to the provisions of the Act of 1840, against suspension of specie payment."

In accepting the new charter, the Bank accepted the previous legislative interpretations of its obligation to pay its 113 notes in coin, as essential to a lawful issue of its currency.

These Acts were public notice to all the world that so long as the Merchant's Bank of South Carolina, at Cheraw, redeemed "*in legal coin* its notes issued by said Bank, *as part of the currency or circulating medium of the State,*" so long were such issues lawful, and so long were its bills or notes *negotiable;* and that the moment that said Bank ceased to so redeem its obligations and put forth its declaration of suspension of specie payments, its issues ceased to be lawful and negotiable, and its bills and notes became dishonored 114 paper, upon which a right of action, at once, accrued to the *bona fide* holder, against the Bank and its sureties, or statutory guarantors—the stockholders.

The moment this right of action accrued, the bank notes, previously issued lawfully under the charter, became, in the hands of the holders thereof, mere *choses in action,* and the bills or notes ceased to be negotiable by delivery, and could only be transferred by assignment, as causes of action.

The allegation of the complainant in his bill (Record, p. 3,

fol. 11,) is that "of the bills of credit of said Bank or promis-
115 sory notes, payable on demand to bearer and *constituting a portion of the circulating medium intended to be furnished by the said Bank in accordance with its charter*, a large amount in the regular course of trade and for valuable consideration came" to him.

This allegation is so framed, as to create the impression that the bills or notes, acquired by the complainant, were received by him, *while* they constituted a portion of the circulating medium intended to be furnished by the said Bank, in accordance with its charter—that is to say, while such
116 bills or notes were being "lawfully redeemed in current coin according to their legal obligation."

This allegation is, however, contradicted by the testimony in the agreed facts, (Record, p. 48, fol. 127,) to wit: "In his regular business as banker and broker, the complainant, Harvey Terry, bought the notes and bills of the said Merchant's Bank of South Carolina, as proved by him in this case, amounting to over twenty thousand dollars, at prices ranging from twenty cents to five cents on the dollar of their face value. *Most of these purchases were made in* 1868 *and*
117 1869, *at about fifteen cents on the dollar.*" It was farther agreed to as fact, that "the said Bank ceased to pay out its bills as soon as the Confederate currency began to circulate. The last time at which any of its bills were paid out, was on the 6th August, 1861." So that, there was no issue at all after August 6, 1861, and no lawful issue, as currency redeemable in coin after 29th November, 1860.

It follows, that the bills purchased by the complainant in 1868 and 1869, must, if lawfully issued, be presumed to have been issued before 29th November, 1860; and there can be
118 no question, that the complainant purchased them as dishonored paper, long after the bank had ceased to redeem its obligations in coin, and long after it had become utterly insolvent.

The only title which any one could successfully maintain, is that of a *bona fide* holder, who received the bills prior to November, 1860. The complainant is not such holder himself, as is admitted on the record. He must, therefore, if he

recovers, at all, recover as assignee of one who held the bills before they ceased to be negotiable, within the purview of the charter. He has not attempted to prove his title by 119
assignment, and unless he shows such assignment of his cause of action from an assignor, who received them as lawful issue before 29th November, 1860, and who is, by virtue of citizenship of another State, entitled to sue in the United States Court for South Carolina, he has no status in this jurisdiction.

THIRTEENTH GROUND.

We have shown, that the Statutes, which authorized the Bank to issue its bills or notes, contemplated that such bills or notes should be made payable in coin, and prescribed heavy penalties against the failure of the Bank to redeem their issues in coin.

It may be said, with accuracy then, that the implied con- 120
dition of the right of the Bank to issue bills and notes under its charter was, that they should always be redeemed in coin —that payment according to the Statute was payment in coin and only in coin, and that failure to pay was, according to the Statute, failure to pay in coin. It follows, that liability consequent upon failure to pay was, within the purview of the Act, liability upon the failure of the Bank to pay in coin.

If, therefore, the stockholder is held to a responsibility, as implied guarnntor, of the bills and notes, through the pro-
visions of the Statute, and on the ground that such pro- 121
visions entered into the implied contract between the bill holder on the one hand and the Bank on the other, and attached to and became part of the bill, or note, then it follows, most surely, that the provisions of the charter, which contemplated such contracts only while the bills were "issued by the said Bank as part of the currency or circulating medium of the State," and which made the failure of the Bank to pay, in coin, a breach of duty to the State, also entered into and became part of the alleged contract of the stockholders, and that the supposed liability as guarantors 122
attaches under the Statute upon the ***failure to pay in coin.***

If the bills or notes, here set up as causes of action, be referred to, it will be seen, that there the express contract of the Bank is on its face a promise to pay in coin, corresponding with the contract implied in the provisions of the charter, and that *failure to pay in coin* is the breach also of the express contract of the Bank with the bill holder, upon which the alleged liability of the stockholder, as guarantor of the bills and notes, must have accrued, if accrued at all.

123 The suspension of specie payments, 29th November, 1860, was *the failure to pay in coin*, which constituted the breach of the implied contract, under the charter, as well as that of the express contract, in the bills of the Bank, and it must be held as an irresistible conclusion that the alleged liability of the stockholders, as guarantors, accrued upon such suspension of specie payments, and not subsequently.

FOURTEENTH GROUND.

We have already shown, that the bills of the Bank, proved as claims in this suit, if they were lawfully issued promises of the Bank, must be presumed to have been issued before

124 the suspension of specie payments in November, 1860.

As to such issues, the notorious and public declaration of suspension of payment in coin was equivalent to demand upon and refusal by the Bank to pay according to the tenor, and the liability of the alleged guarantors to the holders of the bills accrued upon such refusal.

If this be so, the Statute of Limitations, which forbids suits upon such contracts to be brought after the expiration of four years, began to run from 29th November, A. D. 1860.

FIFTEENTH GROUND.

"If the liability clause in the charter of the Bank be con-

125 strued as creating a contract liability to the holders of the bills of the Bank, the persons, who were stockholders at the date of its failure to pay its bills and notes in specie, according to the tenor of the contract, to wit: the 29th November, 1860, were then liable, and the right to sue upon the liability which so accrued was barred, by lapse of time,

before the bill was filed in this case."

The appellee, we presume, will, as in other cases, contend here, that the Acts of the General Assembly of the State of South Carolina, which were passed during "the rebellion," forbidding officers of the State from serving or executing 126
"any mesne, or final process, of any of the Courts of the State for the collection of debts," operated, as an interruption of the process of the United States' Courts, also, upon the theory that the State regulations, as to the operation of the Statutes of Limitation are usually adopted as rules of decision in the United States' Courts.

Even if this view be adopted, and the period of time covered by these Acts of the State Legislature during the war, viz: from 21st December, 1860 to the 21st December, 1866, be excepted from the calculation of time between the 127
accrual of the right of action, (29th November, 1860,)—and the 2d December, 1870—the date of the filing of the bill of complaint in this cause, it will appear, that from 29th November, 1860, to 21st December, 1861, one year and twenty-two days, during which the complainant might have sued, had elapsed before the alleged suspension, leaving two years and three hundred and forty-three days of the four years for the Statute still to run. The period limited by the last Act of the State, (A. D. 1865,) prohibiting the service, or execution of process of the State Courts, expired 21st December, 128
1866. From the 21st December, 1866, to 30th November, 1869, was two years and three hundred and forty-three days, which completed the four years; after which, by the provisions of the State law, (A. D. 1712,) suit upon causes of action, such as the complainant claims to hold, are forbidden. The complainant did not, in this case, file his bill, as has been stated, until 2d December, 1870—five years after the time—when, as appellants contend, the right of action accrued to all holders of the lawful issue of the Bank.

SIXTEENTH GROUND.

"That if the 1st March, 1865, be assumed to be the 'time 129
of failure' contemplated by the Act, the stockholders were

then liable, and their liability was barred, by lapse of time, before the filing of the bill in this case."

On the 1st March, 1869, four years had elapsed from the date assumed in the Decree to be "the time of failure," and of consequent accrual of the alleged liability of the stockholders, and of the right of action of the bill holders.

After 1st March, 1869, suit could not be brought, and complainant's right of action was barred one year and nine months before his bill was filed.

130 But the appellee will contend, that out of the period between 1st March, 1865, and 2d December, 1870, (five years and two hundred and seventy-five days,) is to be excepted one year and two hundred and ninety-six days, (from 1st March, 1865, to 21st December, 1866,) during which the Statute of Limitations was suspended, as is alleged, by force of the Acts forbidding service and execution of process of the State Courts; and that the four years of limitation is to be calculated against his right of action from 21st December, 1866, to 21st December, 1870; so that his bill, filed 2d De-
131 cember, 1870, was within the four years.

This position compels the consideratiou of the question, whether the United States' Courts would be justified in adopting the Acts of the Legislature of South Carolina, passed during "the rebellion," as a rule of decision in this case.

The Acts themselves, as will be seen by reference to them, do not pretend to repeal or suspend the A. A. 1712, (the South Carolina Statute of Limitations,) which had governed the Courts of the State from colonial times, and had been adopted, as a rule of decision in the Courts of the United States always.

132 The first of the series known as the "Stay Laws," (between 1861 and 1865,) was entitled "An Act to extend relief to debtors and to prevent the sacrifice of property at public sales." [So. Ca. Statutes at Large, vol. 13, p. 18.]

Its first Section provides, "that it shall not be lawful for any officer of this State to serve or execute any mesne or final process of any of the Courts of this State for the collection of money until after the expiration of the first ses-

sion of the next General Assembly, except in cases provided for in the second Section of this Act, and *except process for military fines.*"

The terms and date of the Act, taken in connection with 133
the historical circumstances attending it, show that it was distinctly a war measure. It was renewed from year to year during the war. It was a measure of relief and protection to debtors, citizens of the State of South Carolina, which was then engaged in war with the United States Government, and almost all of whose citizens were under arms, or enrolled in military service.

Its last extension was in 1865, prior to the Reconstruction Acts, passed by Congress for the government of "Insurrectionary States." The Courts of South Carolina, prior to 134
that reconstruction, had held, that under the Stay Laws of 1861, and the years succeeding, to 1865, the operation of the Statute of Limitations, upon process in the State Courts, was suspended from 21st December, 1861, to 21st December, 1866; but these Courts, themselves, were overthrown by the process of reconstruction. It cannot be supposed, that the provisions of these Acts, passed for the military purposes of a State in actual war with the United States, will be accepted "as a rule of decision in the National Courts," and applied by this Court to process in the United States' Courts. The 135
terms of the Act, besides, clearly restrict its application to process in the State Courts, and it could only affect suits between citizens of the State.

The Congress of the United States has, by its legislation, (A. C., June, 1864,) 13 Stat., 123; provided a rule, for the guidance of the Courts of the United States, on this subject, viz:

"Whenever during the existence of the present rebellion, any action, civil or criminal, shall accrue against any person who, by reason of resistance to the execution of the laws of the United States, or the interruption of the ordi- 136
nary course of Judicial proceedings, cannot be served with process for the commencement of such action, or the arrest of such person, or whenever, after such action, civil or criminal, shall have accrued, such person cannot, by reason of

such resistance of the laws, or such interruption of Judicial proceedings, be arrested or served with process for the commencent of the action, *the time during which such person shall so be beyond the reach of legal process*, shall not be deemed or taken as any part of the time limited by law for
137 the commencement of such action."

The Record in this case (p. 48, fol. 127,) shows "that the Circuit Court of the United States for the District of South Carolina, was held in Charleston, on the 12th June, 1866."

It is presumed, that the true rule of suspension of the operation of the Statute of Limitations, which the Court will apply to this case, is that which was applied in *Brown vs. Hiatts*, 15 *Wallace*, 177, and other cases since the war; that is to say, that the war suspended the operation of the Statute, and that its suspension began in South Carolina on
138 the 19th April, 1861, and ceased on the 2d April, 1866. (*The Protector*, 12 Wallace, 700.)

If this rule be applied to this case, the operation of the Statute of Limitations was revived on 2d April, 1866. After the 2d April, 1870, the claims of creditors of the Bank were barred in law; and the complainant's bill was not filed until 2d December, 1870, eight months after the bar of the Statute was complete.

In any aspect of the case it would seem that complainant's speculation in bills of the broken banks, came too late for his purposes.

THEODORE G. BARKER.

SUPPLEMENTAL.

After this Brief had been printed an examination of Equity Rule 16, and of the authorities, led to the conclusion, that the service of the subpœna writ is the commencement of a suit in the Equity Courts of the United States, and that the filing of a bill is not in itself the bringing of an action within the letter or the spirit of the Statute of Limitations.

An argument on the point had been prepared, when I learned that my associate Mr. James Lowndes had reached the same conclusion, and had made the point in his Brief. I beg therefore to refer the Court to his argument on this head.

If the Court adopts our conclusion, it ends the claim of the complainant, as his subpœna writs do not appear from Record (p. 15) to have reached the hands of the Marshal before 11 February, 1871. The extremest limit of time which the complainant claims as the period when the bar of the Statute was complete was 21 December, 1870.

Appellants claim, that it should appear of Record, that the complainant not only filed his Bill within the statutory period claimed by him, but that he made due effort to cause his subpœna writ to be served withinthe time claimed.

In view of the very few days which he had allowed himself after filing his bill (2 December 1870) and the end of his four years, (21 December, 1870) as claimed by him, it was incumbent on theComplainant below to have hastened his proceedings, and it was essential to his cause, that he should have done so from the character of his suit. His proceeding being on the Equity side of the Court, against a number of persons for a contributory liability for a deficit of assets, it was necessary to the maintenance of the jurisdiction invoked, that he should not suffer the bar of the Statute to be complete against any of the contributory Defendants. All who upon his theory were liable to contribute should have been brought in by process actually served before the period of liability had elapsed.

THEODORE G. BARKER.

Supreme Court of the United States.

OCTOBER TERM, 1877.

No. 168.

WILLIAM GODFREY and others, *Appellants*,

vs.

HARVEY TERRY and others, *Appellees*.

Appeal from the Circuit Court of the United States for the District of South Carolina.

ARGUMENT FOR APPELLEES.

John Polhemus, Printer, 102 Nassau Street, New York.

D. H. Chamberlain

Supreme Court of the U. S.

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Appellants,

vs.

HARVEY TERRY and others,
Appellees.

BRIEF FOR APPELLEES.

Statement of Case.

December 2, 1870, Harvey Terry exhibited his bill in this cause to the Judges of the Circuit Court of the United States for the District of South Carolina, sitting in equity, in behalf of himself and all other creditors of the Merchants' Bank of South Carolina, at Cheraw, against William Godfrey, as Receiver of the property and assets of said Bank, and other persons, officers and stockholders thereof, setting forth:

1. The incorporation by Act of the Legislature of South Carolina of the said Bank, and the continuance of said incorporation by subsequent renewals and extensions of its charter, until January 1, 1876.

2. That the said Bank was by its charter authorized, among other things, to issue its bills and notes as a circulating medium, and that it did issue its bills and notes, under this authority, to a large amount.

3. That by the charter of said bank, as originally granted and as subsequently renewed and extended, it was provided as follows: "That in case of the failure of the said "bank, each stockholder, co-partnership, or body politic "having a share or shares in the said bank at the time of "said failure, or who shall have been interested therein at "any time within twelve months previous to such failure, "shall be liable and held bound individually for any sum "not exceeding twice the amount of his, her, or their "share or shares."

4. That said bank failed March 1, 1865, and thereupon the several stockholders of the bank became liable for its debts in the manner provided by its charter.

5. That Exhibit "A" is a list of stockholders of said bank so far as can be now ascertained.

6. That under the provisions of an act of the Legislature, passed March 13, 1869, William Godfrey was appointed receiver of the effects of said bank, and thereafter entered upon said office, and now has charge of the assets of the bank.

7. That the complainant is the owner and holder of a large amount of the unpaid bills or notes of said bank, to the payment of which he is entitled out of the assets of said bank, and out of the property of the stockholders, according to the provisions of the charter of the bank.

8. The bill then prays that an account be taken of the debts due by the bank; of its assets; that the same may be distributed according to law, and that decrees may be had against the stockholders, in such manner and to such extent as may be just.

Subpœnas were issued on the same day. (Record, folios 4 to 36.)

The defendants filed several answers to said bill, of all of which the following are the material allegations:

(1.) They admit the incorporation and continuance of the bank in business until 1865, as charged in the bill.

(2.) They deny that the complainants took the bills which they hold when the same circulated as money.

(3.) They deny that any liability is imposed by the

charter upon the defendants for notes so held and obtained.

(4.) They say the liability created by the charter was to the State, and arose upon the failure of the bank to pay coin in redemption of its notes, in November, 1860.

(5.) They say that the claims of the complainants are barred by lapse of time.

(6.) They say that a large part of the unpaid notes of the bank were issued unlawfully in connection with the Confederate States government, and are void, and that the complainants had due notice of these facts.

(7.) They deny that the assets of the bank have been exhausted, or their value ascertained, or the amount of its liabilities.

(8.) They say that the Act of the Legislature of March 13, 1869, operated as a forfeiture of the charter of the bank on December 1, 1869, and that thereupon all liabilities of the bank were extinguished. (Record, folios 61 to 102)

At the November term, 1872, of the court below, it was referred to a Master to inquire and report (1), who were the stockholders of the bank at the time of its failure, as alleged in the bill of complaint, March 1, 1865, or within twelve months previous; (2) what amount of stock was held by each; (3) what are the claims of all billholders and other creditors against the bank; (4) the amount of the assets of the bank. (Record, folio 45.)

Subsequently, at the April term, 1873, another Master was appointed with the same powers and duties. (Record, folio 47.)

April 22d, 1873, the aster reported the proof of certain bills of the bank by their holders, giving a list of the same. (Record, folios 102 to 114.)

April 24th, 1873, William Godfrey, as receiver, filed his separate answer, setting forth his appointment as receiver; that he took possession of all the assets—which he specifies—and that as receiver he had been unable to collect anything whatever from said assets, but has incurred expenses for which he is not paid, and he prays to be dismissed. (Record, folios 54 to 56.)

April 26th, 1873, the Master reported that the failure of the bank took place "on or about the first day of March, 1865;" that the par value of the shares was one hundred dollars; a list of the assets of the bank, consisting of confederate securities, drafts and notes, barred by limitation, one judgment against the Coalfield & Cheraw Railroad Company for $2,500, and a lot of land near Mobile, Alabama; a list of the stockholders at the time of the failure, or within twelve months previous, with the amount of stock held by each. (Record, folios 114 to 118.)

He also reported the testimony taken by him, establishing the facts above stated. (Record, folios 118 to 124.)

November 21st, 1873, the Master, by consent of parties, reported that the bank suspended specie payments November 29th, 1860, and never after resumed. (Record, folio 125.)

April 26th, 1874, the following facts were by consent made a part of the testimony.

1. That the bank suspended specie payments November, 1860, and never after resumed.
2. That the bank ceased to pay out its notes as soon as Confederate currency began to circulate, the last bills being paid out August 6, 1861.
3. That the complainant, Terry, bought the bills proved by him, in his regular business as banker and broker, for from twenty to five cents on the dollar—most of them in 1868 and '69, at about fifteen cents.
4. That the Circuit Court of the United States was held in Charleston, June 12, 1866. (Record, folios 126 to 128.)

April 26th, 1874, defendants excepted to the report of the Master (folios 114 to 118) on these grounds:

1. That the report assumes the day of failure of said bank to be March 1, 1865, whereas the proof shows that the bank suspended specie payments in November, 1860, and never after resumed.
2. That there was no other testimony than the date of suspension of specie payments by which the date of actual failure could be determined.

3. That the names of stockholders reported are the names of those who were stockholders March 1, 1865, and not of those who were stockholders at the date of the suspension of specie payments in November, 1860. (Record, folios 128 to 130.)

December 15th, 1874, the bill was amended by striking out the names of William Godfrey as Receiver and John F. Mathewson as Cashier. (Record, folio 130.)

December 15th, 1874, the final decree was made by which the exceptions were overruled, and it was adjudged (1) that the persons who held stock in the bank March 1, 1865, or within twelve months previous, are liable, individually, to the complainants for sums not exceeding twice the amount of their several shares of stock; (2) that certain persons (naming them) were stockholders and liable according to the terms of the charter; (3) that the Clerk enter up judgments for complainants for the several amounts of their claims (naming them), and (4) that the complainants have execution for the several amounts stated, against the stockholders, with costs. (Record, folios 131 to 143.)

Argument.

No assignment of errors having been filed by the appellants at the time of the preparation of this argument, it becomes necessary to discuss the questions which are raised by the pleadings, except so far as a brief filed in the case of *Carrol* v. *Green*, 92 U. S., 509, by Mr. Barker, but originally prepared in this case, may be regarded as setting forth the errors now relied on in the decree below.

The questions thus raised may be stated as follows:

First.—Is the present suit barred by the Statute of Limitations?

Second.—Is the decree below justified by the nature of the liability of the defendants, the form and scope of the bill, and by the proofs in the case?

Third.—Is the liability imposed by the charter of this bank available only by those who held its bills while such bills circulated as money and were redeemable in specie?

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1. That the report assumes the day of failure of said bank to be March 1, 1865, whereas the proof shows that the bank suspended specie payments in November, 1860, and never after resumed.
2. That there was no other testimony than the date of suspension of specie payments by which the date of actual failure could be determined.

3. That the names of stockholders reported are the names of those who were stockholders March 1, 1865, and not of those who were stockholders at the date of the suspension of specie payments in November, 1860. (Record, folios 128 to 130.)

December 15th, 1874, the bill was amended by striking out the names of William Godfrey as Receiver and John F. Mathewson as Cashier. (Record, folio 130.)

December 15th, 1874, the final decree was made by which the exceptions were overruled, and it was adjudged (1) that the persons who held stock in the bank March 1, 1865, or within twelve months previous, are liable, individually, to the complainants for sums not exceeding twice the amount of their several shares of stock; (2) that certain persons (naming them) were stockholders and liable according to the terms of the charter; (3) that the Clerk enter up judgments for complainants for the several amounts of their claims (naming them), and (4) that the complainants have execution for the several amounts stated, against the stockholders, with costs. (Record, folios 131 to 143.)

Argument.

No assignment of errors having been filed by the appellants at the time of the preparation of this argument, it becomes necessary to discuss the questions which are raised by the pleadings, except so far as a brief filed in the case of *Carrol* v. *Green*, 92 U. S., 509, by Mr. Barker, but originally prepared in this case, may be regarded as setting forth the errors now relied on in the decree below.

The questions thus raised may be stated as follows:

First.—Is the present suit barred by the Statute of Limitations?

Second.—Is the decree below justified by the nature of the liability of the defendants. the form and scope of the bill, and by the proofs in the case?

Third.—Is the liability imposed by the charter of this bank available only by those who held its bills while such bills circulated as money and were redeemable in specie?

Fourth.—What effect, if any, upon this liability, was produced by the act of the Legislature of South Carolina, entitled, "An Act to enable the banks of the State to renew business, or to place them in liquidation?" (14 Stat. at Large, 212.)

I.

Is the present suit barred by the Statute of Limitations?

The discussion of this question involves several distinct points:

First.—The time of the failure of the bank, or the date when the right of action arose.

It will be assumed that the right of action arose upon "the failure of the bank," in accordance with the express language of the charter;—"in case of the failure of the said bank, each stockholder * * * shall be liable and held bound individually," &c.

When did the "failure" of the bank take place?

The brief of Mr. Barker, to which we have referred, assigns as error in the decree below, that it "assumes without proof being taken and against the admitted facts, that the date of the failure of the bank was the 1st day of March, A. D., 1865." And again, that "there was no other testimony before the Court than the date of the suspension of specie payments, viz.: the 29th day of November, 1860, by which the date of the actual failure could be ascertained or determined." (Folios 55 and 57.)

By reference to the record it will be found that the Master reported, as among the facts elicited by his examination of witnesses, that "*the Bank failed on or about the first day of March, A. D.* 1865." (Folio 114.)

At folio 119 appears the sworn testimony of William Godfrey, who says: "I am the receiver of the Merchants' Bank of South Carolina, at Cheraw, and was President of said bank for five or six years, up to the time of its close. *The bank finally closed about the first of March, A. D.* 1865." The witness then proceeds to give a list of the stockholders "at the time of its failure." At folio 122 appears the testimony of John F. Matheson, who testified that he was "*cashier at the time of the final closing of*

the Merchants' Bank of South Carolina, at Cheraw, on or about the first of March, A. D., 1865." * * * "The Bank's last dividend was in January, 1865."

This testimony was uncontradicted, and sufficiently establishes the fact that the bank suspended business and finally closed its operations March 1, 1865.

It is also one of the admitted facts in this case that "the Merchants' Bank of South Carolina, at Cheraw, suspended specie payments at the same time with the other banks in the State; was so suspended in November, 1860, and never after resumed specie payments." (Folio 126.)

The question thus arises, can the date of the suspension of specie payments be regarded as the date of the "failure" of the bank?

It is not questioned that the bank continued its regular business as a bank from November, 1860, to March 1, 1865.

No suspension or interruption of its business occurred till March, 1865.

It is now contended with apparent seriousness, that the term "failure," as used in the charter now under examination, means merely the suspension of specie payments, and this having taken place in November, 1860, the right of action against the stockholders arose at that date.

An examination of the legislative history of the banks of South Carolina will best refute this claim.

In the "Act to incorporate the South Carolina and State Banks," passed December 19, 1801, (Stat. at large, vol. 8, p. 3), it is provided in section 8 that "in case of *the failure* of said banks, or either of them, each stockholder, co-partnership, etc., who holds stock therein, or who has held such stock at any time within twelve months previous to *such failure or bankruptcy*, shall be held liable," etc.

In the Act to incorporate the State Bank, passed in 1802 (Stat. at large, vol. 8, p. 14), in section 19, the same language—"failure or bankruptcy"—is used.

Again the same words are used in the Act incorporating the Union Bank in 1810 (Stat. at large, vol. 8, p. 16.)

And again in the Act incorporating the Planters' and Mechanics' Bank, in 1810 (Stat. at large, vol. 8, p. 24), and in the Act incorporating the Bank of Hamburg (vol. 8, p. 43), in 1822, and the Bank of Cheraw (vol. 8, p. 47), in 1824.

The first instance in which the explanatory or additional term, "bankruptcy," is dropped, occurs in the Act incorporating the "Commercial Bank of Columbia," in 1831 (Stat. at large, vol. 8, p. 63), where in section 21 the word "bankruptcy" is omitted.

For thirty years, then, the term "failure" was used as synonymous with "bankruptcy."

After 1831 the single term "failure" is used.

In 1833 the charter of the State Bank was renewed (Vol. 8, p. 68), and in section 2 of the charter of renewal it is provided as follows: "In case of the failure of the said State Bank, each person, body corporate or copartnership, who at the time of its failure holds, or for six months previous thereto has held, any share or shares therein shall be held liable and bound, both as individuals and corporate bodies, *to make good the debts of said bank*, to an amount not exceeding double the amount of their shares," etc., etc.

This section appears to be merely another form for expressing the purpose of the Legislature, and plainly negatives the idea that this section was intended to provide a penalty for the suspension of specie payments. The liability is "*to make good the debts of the bank.*"

In 1833 the Merchants' Bank of South Carolina, at Cheraw, was incorporated and the usual provision for the individual liability of stockholders was inserted (Vol. 8, p. 73). The section is in these words: "In case of *the failure* of the said bank, each stockholder, copartnership or body politie, having a share or shares in the said bank at the time of *such failure*, or who shall have been interested therein at any time within twelve months previous to *such failure*, shall be liable and held bound individually for any sum not exceeding twice the amount of his, her, or their share or shares."

The Bank of Charleston was rechartered in the same year (Vol. 8, p. 78), with the above provision, and also the Bank of Camden. (Vol. 8, p. 84).

The Bank of Hamburg was rechartered, with the same provision, in 1835 (Vol. 8, p. 89), except that the limit of twelve months previous to the failure, is changed to six months.

The Bank of Georgetown, with the same provision as the Bank of Hamburg, was chartered in 1836 (Vol. 8, p.95).

It thus appears that *for forty years prior to* 1840, this section, with slight changes of phraseology and no change in meaning and purpose, had been inserted in the charters of *all the banks of South Carolina.*

In 1840, an "Act to provide against the suspension of specie payments, by the banks of this State," was passed. (Vol. 11, p. 100).

Section 1, of this Act, makes the Act a part of the charter of all the banks of the State, etc.

Section 2, provides that "every bank which shall suspend the payment of current coin for its notes, or which shall declare a determination to suspend or refuse payment of its notes according to their legal obligation in current coin, shall become liable to pay to the State of South Carolina, at the expiration of every month after such suspension or declaration, a sum of money at the rate of five per centum per annum upon the whole amount of its notes which have been issued. in circulation at the commencement of said month, and shall continue to pay at the same rate at the end of every month until the bank shall revoke its declaration, and shall lawfully redeem its notes when demanded according to their legal obligations, the said sum of money to be recovered by action of debt in any court of competent jurisdiction."

Section 7 of the same Act requires each bank to notify the Governor of its acceptance of this Act, and requires the Governor in case of the failure of any bank to give such notice, to cause legal proceedings to be taken "*to vacate and declare void its charter.*"

In 1853 the charter of the Merchants' Bank of South Carolina, at Cheraw, was renewed (Vol. 12, p. 221).

By section 2 of this Act the Bank is made subject to all the provisions of the Act of 1840 "to provide against the suspension of specie payments."

Section 4 re-enacts, *totidem verbis*, the section already quoted from the original charter of 1833, providing for the individual liability of the stockholders in case of the failure of the bank.

It thus appears that the section imposing an individual liability for the debts of the bank, is *older by forty years* than the Act providing against the suspension of specie payments, and that the two provisions are continued as separate and independent provisions *after* 1840.

But in 1857, an Act was passed (Vol. 12, p. 539) entitled "An Act for the suspension of certain sections of certain Acts, and for other purposes," by which the operation of Section 2 of the Act of 1840, "to provide against the suspension of specie-payments," is suspended till January 1, 1859.

Section 3 of the same Act limits the lawful issue of the banks, after January 1, 1860, to three times the amount of coin or bullion in hand by the bank, and declares that any bank violating this provision shall forfeit *to the State* $500 per day, while the violation continues.

Here it is seen that while there is a suspension of the provisions against the suspension of specie payments, the provisions for the individual liability of the stockholders remained unaffected and in full force.

Section 3 of the Act of 1857 was again suspended in its operation by the Act of 1859 (Vol. 12, p. 668) till January 1, 1861.

By the Act of 1861 (Vol. 12, p. 735), the third section of the Act of 1857 and the second section of the Act of 1840 were suspended till January 1, 1862.

By Acts passed each year this suspension of all Acts requiring payment of their notes in specie by the banks, was continued, (Acts of 1861, p. 42; Acts of 1862-63, p. 168,) and by the Act of December, 1863, the suspension (p. 191,) was continued "to the close of the war between

the Confederate States and the United States, and for one year thereafter," provided, its privileges "should not extend to any bank paying coin for its notes, or selling or disposing of coin, except to the government of the Confederate States.

The legislative history of the banks of South Carolina now presented, establishes four points:

1. That the term "failure" was for more than thirty years used in the charters of the banks as equivalent to "bankruptcy," or failure in business, suspension of business.

2. That the section imposing an individual liability upon the stockholders was a part of the charters of all the banks prior to 1840.

3. That after 1840 it continued as a substantive and independent part of each of the charters.

4. That in 1857 the sections requiring the payment of bank notes in specie were suspended and remained suspended till the close of the war, while the sections imposing the individual liability of the stockholders remained in full force.

These conclusions are a sufficient answer to the arguments made by the appellants, (1) that the term "failure" means failure to pay in specie, and (2) that the section imposing an individual liability upon the stockholders is to be regarded as a mere safeguard against the suspension of specie payments.

In the case of the *S. C. Manuf'g Co.* v. *Bank*, 6 Rich. Eq., 227, Chancellor Dunkin refers to the individual liability of stockholders in these words:

"As early as 1801, stockholders in banks, in case of the failure of such institutions, were declared liable for twice the amount of their subscription, or of the value of any stock which they held within twelve months of the failure of the bank. * * * All these precautions are designed *to protect the community* from the danger of a fictitious

credit. Having no original resource for the payment of their debts but the capital of the ideal personage created by the Charter, the payment of this is scrupulously secured, *and there is superadded a limited individual responsibility* which would not otherwise exist" (p. 236).

We may, therefore, regard it as established by the proofs in the case, as well as upon a proper construction of the legislative provisions in question, that the failure referred to in the charter of this bank took place on March 1, 1865.

Assuming March 1, 1865, as the date of the failure of the Merchants' Bank, and, consequently, the time when the right of action in this case arose, the question arises: Is the present suit barred?

The courts of the United States always apply the statutes of limitations of the state where the court sits, and adopt the same rule of construction that prevails in the state court.

Nicolls v. *Rodgers*, 2 Paine, 437, 440.
Shelby v. *Guy*, 11 Wheat., 361.
Ogden v. *Saunders*, 12 Wheat., 213, 349, 350.
Bell v. *Morrison*, 1 Peters, 351, 358, 359.
Stewart v. *Kahn*, 11 Wall., 506.

The present question arises solely under the statutes of limitations of South Carolina.

The Act of 1712, 6th section (Stat. at Large, Vol. 2, p. 285), provides "that * * * all actions of account and upon the case (other than such accounts as concern the trade of merchandise) * * * all actions of debt procured upon any lending or contract without specialty, all actions for arrearages of rent reserved by indenture, all actions of covenants * * * which shall be brought at any time after the ratification of this Act, shall be commenced and sued within the time of limitation hereafter expressed, and not after: that is to say, *the said actions upon the case* other than for slanders. And the said actions for account * * * and the said actions for * * * debt, within three years next after the ratification of this Act, or within four years

next after the cause of such action or suits, and not after."

It was held in *Carroll* v. *Green*, 92 U. S., 509, "that as the liability of the stockholders arose from their acceptance of the Act creating the corporation and their implied promises to fulfill its requirements, the proper remedy was an action on the case; and that, as the Statute barred such an action at law, it was a good defense in equity."

From March 1, 1865, to December 2, 1870, the date of the filing of the present bill, is a period of five years, nine months and one day.

But the operation of the Act of Limitation was suspened during a part of this time.

In December, 1861, the Legislature passed an Act entitled "An Act to extend relief to debtors and prevent the sacrifice of property at sheriffs' sales," (Stat. at Large, Vol. 13, p. 19) by the 5th section of which it was provided "that the operation of the Statutes of Limitations be and the same is hereby suspended during the period in which this Act is of force, so far as applicable to causes coming within the meaning of this Act."

By yearly renewals this Act was continued in force till December, 1866. (Acts of 1861, p. 18. Acts of 1862, p. 148. Acts of 1863. p. 199. Acts of 1864, p. 232.)

The Acts of 1865, p. 304, continued the suspension, "till the adjournment of the next regular session of the General Assembly."

In *Wardlaw* v. *Buzzard*, 15 Rich., 158, it was held that this act of suspension continued in force till December, 1866.

In *Harllee & Pressley* v. *Ward*, 15 Rich., 231, it was held that the act was continued in force "*till the end of the regular session of* 1866, *December* 21, 1866," it being expressly stated on page 238 "that adjournment took place, December 21, 1866."

From March 1, 1865, to December 21, 1866, is a period of one year, nine months, and twenty days, during which the statute of limitation was suspended.

Deducting the latter period from the whole period from March 1, 1865, to December 2, 1870, we have left a period of only three years, eleven months, and eleven days, during which the statute of limitation was in operation.

The present suit was therefore not barred by lapse of time upon this calculation.

But other deductions must be made.

By the Act of Congress of March 2, 1867 (14 Stat. at Large, 428), entitled "An Act to provide for the more efficient government of the rebel States," the existing State governments in ten States, which had been in rebellion, including South Carolina, were declared to be illegal and provisional only, and the government of those States was vested in military commanders to be appointed by the President.

By this Act the several rebel States named therein, were divided into military districts and "made subject to the military authority of the United States." It was made the duty of the military commander "to protect all persons in their rights of property and person, &c., to suppress insurrection, &c.," and to this end to allow the local tribunals to act, or to supersede them.

This act was amended and supplemented by the Act of March 23, 1867 (15 Stat., 2), of July 19, 1867 (15 Stat., 14), and of June, 25, 1868 (15 Stat., 73), which enlarged and defined the powers of the military commanders, and declared the scope and meaning of the Act of March 2, 1867.

Pursuant to these Acts a military commander was appointed for the district embracing South Carolina, and by "General Orders, No. 10," dated "Headquarters, Second Military District, Charleston, S. C., April 11, 1867," the military commander (Maj.-Gen. Sickles) ordered as follows:

"II. Judgments or decrees, for the payment of money, in causes of action arising between the 19th of Dec., 1860, and the 15th of May, 1865, shall not be enforced by execution against the property or person of the defendant. *Proceedings in such causes of action, now pending, shall be stayed; and no suit or process shall be hereafter instituted or commenced, for any such causes of action.*"

By "General Orders No. 164," dated "Headquarters Second Military District, Charleston, S. C., December 31, 1867," the military commander (Maj.-Gen. Canby) ordered as follows:

"I. Paragraph 2 of General Orders No. 10, from the Headquarters of the Second Military District, dated April 11, 1867, is modified as follows: Judgments and decrees for the payment of money in causes of action arising in North Carolina, between the 20th day of May, 1861, and the 29th day of April, 1865, and in South Carolina, between the 19th day of December, 1860, and the 29th day of April, 1865, shall not be enforced by execution against the person or property of the defendant. Proceedings for such causes of action now pending shall be stayed, and *no suit or process shall be instituted or commenced in such causes of action until after the civil government of the respective States shall be established in accordance with the laws of the United States.*"

The present cause of action falls unquestionably within the class here specified, being a cause of action "arising between December 19, 1860, and April 29, 1865."

The proclamation of President Johnson, announcing the compliance of South Carolina with the terms of the Reconstruction Acts and her restoration to civil government within the Union, is dated July 11, 1868. (15 Stat., 704.)

The period during which suits on the causes of action named in said orders was suspended, namely, from April 11, 1867, to July 11, 1868, is one year and three months. Deducting this period from the period of three years eleven months and eleven days already ascertained, and the result is a period of two years and eight months and eleven days only during which suit could have been brought upon the present cause of action prior to December 2, 1870, the date of the filing of the present bill.

It is not needful to enter into any defense of the Reconstruction Acts or to discuss here their constitutionality. They were actually enforced. The stay in question was

not only ordered by the military commander, but actually enforced, and all suits were suspended and prevented in accordance with the terms of the orders till after July 11, 1868. It is impossible that any Court will declare that the stay thus actually enforced shall now be disregarded.

But in *Raymond* v. *Thomas* (91 U. S. 712), this Court plainly intimates that such orders were within the powers conferred on the military commander by the Acts of Congress. In that case the military commander had issued an order wholly annulling a decree of a Court of Chancery in a case within its jurisdiction, and not forbidden to be made by any military order.

"The Acts of Congress," says Mr. Justice Swayne, "give very large governmental powers to the military commanders designated, within the States committed respectively to their jurisdiction, but we have found nothing to warrant the order here in question. *It was not an order for mere delay. It did not prescribe that the proceedings should stop till credit and confidence were restored.* It wholly annulled a decree in equity regularly made by a competent judicial officer in a plain case clearly within his jurisdiction and where there was no pretense of any unfairness, of any purpose to wrong or oppress, or of any indirection whatsoever."

Again, in *Stewart* v. *Kahn*, 11 Wall., 506, 507, this Court say:

"Congress is authorized to make all laws necessary and proper to carry into effect the granted powers. The measures necessary to be taken in carrying on war or to suppress insurrection are wholly within the discretion of those to whom the substantial powers involved are confided by the Constitution.

"In the latter case (to suppress insurrection) the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."

These orders of the military commanders have been recognized as valid and effective by both the legislative and judicial authorities of South Carolina.

By an Act of the Legislature, passed September 22, 1868 (Stat. at large, vol. 14, p. 87), entitled "An Act to quiet rights vested under military orders," it was enacted "That all rights of property vested, accrued, or in action, by virtue of the judgments, orders or decrees of military tribunals, or by virtue of General or Special Orders issued by military commanders on duty in the State since the first day of March, 1865, and up to the time of the expiration of the late Provisional Government of South Carolina, are hereby affirmed and declared valid, and the same shall be unquestioned in the Courts of the State."

In *Cosgrove* v. *Butler*, 1 S. C., 241, the Supreme Court of South Carolina expressly recognized the validity of General Orders No. 10 and No. 164 in the particulars now under discussion. This was an appeal from an order dismissing a petition to vacate a judgment obtained by Butler against Cosgrove upon a cause of action arising between the times specified in said General Orders.

The Supreme Court says: "The cause of action arose between the 19th December, 1860, and the 29th April, 1865, and was therefore within the operation of the General Orders, Numbers 10 and 164, from Headquarters Second Military District, dated respectively April 11 and December 31, 1867, which stayed proceedings in causes of action which arose within that period."

After stating the condition of the present appeal the Court continues: "The action had been commenced prior to the promulgation of General Orders No. 10, and was a proceeding pending at the date of General Orders No. 164. These operated no otherwise than as a mere regulation of the proceedings of the Courts, declaring a rule for the practice of the Courts, staying their action in a given class of cases which were properly within their jurisdiction."

The Court holds as a conclusion in this case that as statutes of limitation must always be duly pleaded, and as the defendants had failed to plead the General Orders in question the appeal must be dismissed.

State v. *Jennings*, 15 Rich., 42, decided by the Court of Appeals in 1867, is a distinct recognition also of the valid-

ity and binding force of the orders of the military commanders in the State.

The conclusion, then, is upon this branch of the case, that the present suit is not barred by the statute of limitation of four years.

In the answer ofA. Baxter Springs, one of the defend ants, the plea is set up "that the complainant did not commence his action within six months after the time this defendant became liable to the penalty imposed by the fourth section" of the charter of the bank. (Record, folio 90.)

This has reference to the Statute of Limitation for the enforcement of penalties and forfeitures, limiting the time within which such actions must be brought to six months after the penalty or cause of forfeiture accrued. (Stat. at Large, vol. 2, p. 586.)

That the individual liability of stockholders, under the charter now under examination, is not a penalty, or in the nature of a penalty or forfeiture, is clear upon the following cases, all of which hold it to be a liability in the nature of contract, arising from the acceptance of the charter and the implied promise of the stockholders to become responsible to the creditors of the bank, according to the terms of the charter.

Carrol v. *Green*, 92 U. S., 509.
Pollard v. *Bailey*, 20 Wall, 521.
Lindsay v. *Hyatt*, 4 Edw. Ch., 104.
Corning v. *McCullough*, 1 Comst., 58.
Baker v. *Atlas Bank*, 9 Met., 182.
Bullard v. *Bell*, 1 Mason, 243.
Moss v. *McCullough*, 7 Barb., 279.
Thornton v. *Lane*, 11 Geo., 459.
Hatch v. *Burroughs*, 1 Woods, 445.

The conclusion, upon the whole of this branch of the argument, is that the present suit is not barred by lapse of time, upon any possible legal view or calculation.

II.

Is the decree below justified by the nature of the liability of the defendants, the form and scope of the bill, and by the proofs in the case?

The nature of the liability of a stockholder, under a charter similar to that now under consideration, has been abundantly determined by adjudged cases in this Court and in the state Courts.

(1.) Such liability is not a penalty, or in the nature of a penalty.

(See cases above cited.)

(2.) The liability is not that of a guarantor or surety.

Terry v. *Tubman*, 92 U. S., 156.
Bell v. *Bullard*, 1 Mason, 243.
Moss v. *Averill*, 10 N. Y., 449.
Robinson v. *Lane*, 19 Geo., 337.
Kimbro v. *Bank of Fulton*, 49 Geo., 419.
Clark v. *Myers*, 11 Hun., 608.

The liability is primary, original, and direct, arising from the voluntary acceptance by the stockholders of the terms of the charter; attaches the moment the debt is contracted by the bank, and remains fixed until it is paid.

Terry v. *Tubman*, 92 U. S., 156.
Lane v *Morris*, 8 Geo., 468.
Thornton v. *Lane*, 11 Geo., 459.
Hatch v. *Burroughs*, 1 Woods, 445.
Harper v. *McCullough*, 2 Denio, 123.

Such being the nature of the liability in question, the next consideration has reference to the proper form of proceeding to enforce it.

In *Pollard* v. *Bailey*, 20 Wall., 520, it was held that where, by the charter of a bank, the stockholders "are bound respectively for all the debts of the bank, *in proportion* to their stock holden therein," the proceeding should be in equity, where "the proportion can be ascertained upon an account taken of debts and stock, and a *pro rata* distribution of the debts among the several stockholders."

The cases of *Crease* v. *Babcock* and *Grew* v. *Breed*, 10 Metcalf, 525, 575, are to the same effect.

These cases were made upon charters in which the liability was expressly made *proportional*, and their authority is, of course, strictly limited to similar charters. In the present case the liability is not proportional in terms, but is fixed at twice the amount of stock held by each stockholder.

Under numerous decisions in New York and Georgia, a suit might be maintained by a single creditor against a single stockholder, or against several, where the liability of each is fixed and absolute.

But in *Terry* v. *Calnan*, 4 S.C., 508, the Supreme Court of South Carolina, in reviewing a decision upon a demurrer for want of parties plaintiff, in that the plaintiff had not joined with him the other creditors of the bank, said: "The form of the complaint, as to the parties, is not reconcilable with any claim to relief except such as can be granted through the equitable jurisdiction of the Court;" holding that, if the stockholders are liable, the proceedings must be in equity.

The present proceeding is in conformity to the decision of the Supreme Court of South Carolina in *Terry* v. *Calnan*, as well as in *Crease* v. *Babcock*, and *Grew* v. *Breed*, already cited.

In *Terry* v. *Tubman*, 92 U. S., 156, it was held that, in enforcing the individual liability of the stockholder, "it is not necessary first to exhaust the assets of the bank by legal proceeding;" that resort may be had at once to the guarantor without a previous proceeding against the principal; that "a judgment and execution unsatisfied are evidence of insolvency," but only evidence, and that the fact may be established by other evidence, as "by an assignment and continued suspension of business, or other notorious indications;" and that "the liability for the redemption of the bills, if properly enforced, arises when the bank refuses or ceases to redeem, and is notoriously and continuously insolvent."

In the assignment of errors by Mr. Barker, already referred to, it is said that the complainants are only entitled to recover, in any event, the balance of their claims after the assets have been ascertained and applied, according to law, to the liquidation of the debts of the bank; that all the liabilities of all the stockholders should be ascertained and a fund created by a just contribution in equity among all who are liable; and that the present proceedings and decree are not in accordance with these principles.

The record shows, however, that the Master was directed to find and report (1) the stockholders liable; (2) the stock

held by each; (3) the claims of all billholders or other creditors; (4) the assets of the bank (folio 45).

The record further shows that, after due notice to *all* creditors, the Master proceeded to take proof of all claims presented, and reported the same to the Court (folios 102 to 114); that he subsequently reported the names of the stockholders liable, with the number of shares held by each at the time of the failure, or within twelve months previous; and a list of all the assets of the bank (folios 114 to 118).

The Court below had thus ascertained (1) all the liabilities or debts of the bank; (2) all the stockholders liable; (3) the amount of stock held by each stockholder liable; (4) the assets of the bank.

These are the findings of fact upon which the decree is based.

(1) As to the assets. The answer of William Godfrey, the Receiver, filed April 24, 1873 (folios 54 and 55), avers that he was appointed Receiver in 1870; that he took possession of the assets, which he enumerates; that "he has been able to collect nothing from these assets;" and that there are expenses due him as Receiver, which are unpaid. Upon this answer, no evidence or offer of evidence being made to the contrary, the Court below dismissed the bill as to the Receiver, the purpose for which he was made a party having been served, as laid down by the Supreme Court of the State in *Terry* v. *Calnan*, above cited: "He (the Receiver) is here a proper party, because the assets of the corporation, in his hands, must be applied, in aid of the stockholders, to diminish, to the extent they may avail, whatever liability the charter may have imposed on them, on the equitable principle that if the stockholders are liable for the debts of the corporation, its property is to be administered in their aid to lighten the burdens which may fall upon them."

There was no distribution of assets, because the case showed there were none to distribute.

There being no assets, the decree proceeds to adjudge that the stockholders named are liable for sums not exceeding twice the amount of the stock, and that judg-

ments be entered and executions issued in favor of the complainants against the said stockholders for the amounts of their claims as proved.

These features of the decree are in strict accordance with the legal obligations of the stockholders and the legal rights of the complainants. The former are liable to twice the amount of their stock; the latter are entitled to recover the amount of their claims if the same fall within the limits of the liabilities, respectively, of the stockholders.

The mandate of the writ of execution to be issued in accordance with Rule 8th of the Court of Equity of the United States, as well as §§ 995 and 996 of the Revised Statutes, requires the Marshal to have the money in Court or deposited to its credit; and the Court would, as a matter of course, direct the manner of its distribution to the several parties entitled to it.

If it be urged that the aggregate amount for which the appellants have been adjudged liable is greater than the aggregate of the debts proved, the answer is that the Marshal has only to collect the aggregate amount due the creditors; and if this be collected from a part only of those adjudged liable, those who thus pay the whole are entitled to contribution from their fellow-stockholders adjudged liable, provided the liability of each stockholder is only for his proportional part of the debts proved.

"If the liability of two or more persons be joint, he who has paid more than his share is entitled to contribution from the rest."

Willard's Eq. Jur., 106, *et seq.*

"Those stockholders who are compelled to pay more than their ratable proportions of the debts contracted while they were stockholders, will undoubtedly have a claim for contribution against other stockholders, who are liable for the same debts, and who pay less than their shares."

Judson *v.* Rossie Galena Co., 9 Paige, 603.

And this is true whether the stockholders are bound jointly or severally.

Norton *v.* Coons, 3 Denio, 130.
Wells *v.* Miller, 66 N. Y., 255.
Clark v. *Myers*, 11 Hun., 608.

From this examination, the decree of the Court below appears to be, in all respects, in accordance with the rights of the parties and the proofs before the Court.

III.

Is the liability imposed by the charter of this bank available only by those who held its bills, while such bills circulated as money and were redeemable in specie?

This question will be answered by a consideration of the nature of bank bills, their form and legal characteristics.

A bank bill is a promissory note, payable to bearer on demand, and intended to circulate as money. *Byles on Bills*, 204; *State* v. *Bank of South Carolina*, 1 Speers, 433; Broom's Leg. Max., 689.

In *Morse on Banks and Banking*, 416, it is said: "It is familiar that the title to bank notes passes by mere delivery. It has also been seen that the receiver of bills has the position of an original promisee of the bank. He does not take, as by an assignment, only the title of the person paying them over to him. He need only receive them in the usual course of business, for a full and fair consideration, and in good faith. His title is then unimpeachable by any party, though they may have been put in circulation fraudulently, or may have been stolen from the bank or from a subsequent holder." *Bay* v. *Coddington* (5 Johns., Ch., 54) and cases there cited; also, especially, *Goldsmith* v. *Lewis Co. Bank* (12 Barb., 407). Hence, it follows as a rule of law, that possession is *prima facie* evidence of title. The holder may sue the bank and recover simply by virtue of such possession unless the bank can show by positive proof that the possession was obtained *mala fide*. The bank may always safely pay the holder, and will discharge itself thereby, unless it knows, or has sufficient reason to know, that the possession was fraudulently come by. Bank bills are now usually made payable to bearer, though they are sometimes expressed to be payable to A. B. or bearer. In a suit upon such a bill, it was once argued that the person named might not have been competent to sue the defendant in the United States Courts. This

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objection was disposed of by the Supreme Court of the United States with the remark: "This Court has uniformly held that a note payable to bearer is payable to anybody, and not affected by the disabilities of the nominal payee."

Bank of Ky. *v.* Wister, 2 Peters, 318.

In *Bullard* v. *Bell* (1 Mason, 243), Judge Story says: "A note payable to bearer is often said to be assignable by delivery. There is no assignment in the case. It passes by mere delivery, and the holder never takes any title by or through any assignment, but claims merely as bearer. The note is an original promise by the maker to pay any person who shall become bearer. It is, therefore, payable to any and every person who exclusively holds the note *bona fide*, not by virtue of any assignment of the promise, but by an original and direct promise, moving from the maker to the bearer. The case is still stronger in relation to bank notes, for, in the common transactions of life, they pass by delivery as cash. They pass out of and into the bank a thousand times, and are always understood to be payable to bearer, whoever for the time being, he may be, and to no one else. Bank notes payable to bearer, are always deemed good while they are in circulation, notwithstanding they have been presented to the bank, and paid by the bank." * * *. The present action is not founded on an assignment; it is an original action, created by the statute, between the present parties, and never had any existence between any other parties. The debt which the plaintiff claims from the defendant is a sum which the latter never owed to any other person. It is a chose in action, originally vested under the statute in the present plaintiff, and which has never been assigned."

Crease v. *Babcock* (10 Metcalf, 525), was a bill brought by the plaintiffs against sundry stock-holders of the Chelsea Bank, under a section of the Revised Statues of Massachusetts, which provides that the holders of stock in any bank should be liable in their individual capacities for the redemption of all bills issued by

said bank, in proportion to the stock they may respectively hold at the dissolution of the charter. *Chief Justice Shaw*, delivering the opinion of the Court, says: "The next question argued as a separate and distinct question, and one of considerable importance, is, whether this remedy is confined to those who were the holders of the bills at the time when the bank charter expired by the repeal of the Act of incorporation; or, to state the question somewhat more precisely, whether it is necessary for the complainants, in order to maintain this suit, to prove affirmatively that they were holders of the same bills in respect to which they now claim as creditors in this suit when the charter expired. Upon this question the Court are of the opinion that the remedy is not confined to those who were holders at the time of such repeal, and that it is not necessary for the complainants respectively to give proof of that fact, but that when any person, after such repeal, took such bills in the ordinary course of business, or otherwise acquired a good title to the same, such bills are bills remaining unpaid within the provision of the Statute giving this remedy, and that the holders of them have a right to come in and claim as creditors, and that in such a suit, the possession and production of the bills furnish *prima facie* evidence of such title.

We are first to consider what is the nature of a bank note, the purposes which it is intended to subserve, and the objects of the Legislature in providing this extraordinary security for its payment and redemption. It is indeed a contract, a legal obligation entered into by the bank, but is in the nature of a bill of credit, intended to pass in the freest manner, from one to another, as current money, and, for the time being, to subserve the purposes of money; for this purpose it was made transferable by delivery, was issued and reissued by the bank without regard to its date or to the fact of its having been paid once or more times, and the holder is under no necessity of giving any other evidence of title than possession. Again, the legal character of bank notes is not necessarily changed at the moment the act of incorporation is repealed. Suppose their credit is in some degree impaired, why should not a holder be permitted to transfer them according to their original character and purpose at the best price he can

obtain for them, exercising his own judgment and his own right to hold them himself, or to confer on another the full rights of a *bona fide* holder? It seems to us that this construction of the law is best calculated to serve the purposes of the Legislature. The object was to provide a fund for the redemption of the bills. It must have been contemplated that these bills would be widely scattered and many of them held in small amounts, or in single bills of one or more dollars.

It would be attended with great inconvenience if every holder of a single bill should be obliged to come in as a creditor or otherwise lose the benefit of the provision intended for his benefit. And this inconvenience is so considerable that we think it could not have been contemplated by the Legislature.

But we think the provisions of the Statute are in conformity with what we should have expected. It is not a provision that the holders of the bills at the time of the dissolution shall be entitled to claim, but that the holders of stock shall be liable for the payment and redemption of all unpaid bills. Of course payment is to be made to those who are the lawful holders of the bills, and as the Statute does not fix the time of the expiration of the charter as the time when the right accrues, it may be held to apply at any time at which payment of such bills is legally demandable, and of course payment must be made to those who are then the legal holders." (pp. 560–562.)

"It was argued that although the bills were negotiable yet the Statute liability, when once fixed, is personal to the *then* holder, and cannot pass to any other person by the transfer of the bills. But we cannot feel the force of this argument. If the Statute had provided that the persons then holding the bills should be entitled to claim, etc., there would have been more force in it; but the same power which could create this liability could as easily annex it to the bill and make it pass with the bill to any one who should become holder, and this, we think, is precisely what the Statute has done. We are, therefore, of opinion that, in regard to all those who were originally parties complainant in this suit, and who have produced Chelsea Bank

bills, they will be presumed, in the absence of proof to the contrary, to have held such bills so as to entitle them to commence the suit at the time it was commenced. And, in regard to all those who may come in before the Master to prove their claims, the bills produced will be presumed to be held by a legal title, and will enable them, in the absence of proof to the contrary, to maintain their claims to the amount of the bills so produced." (p. 563.)

Grew v. *Breed* (10 Metcalf, 569), was another case which arose under the same provision of the Statute of Massachusetts, in which the claim of the plaintiffs was contested upon the ground, among others, that the bills sued on had been taken from a broker at a discount, and on an agreement that they should not be put into circulation within a limited period.

In noticing this argument the Court say: "It is agreed on all hands that this limited and qualified Statute liability of the stockholders to make good any loss to those holding their bills, was intended to give greater security and credit to bank bills than to any other species of negotiable contracts. It would be a heavy clog upon the circulation of bank notes as currency if each party taking them should be deprived of this Statute liability of the stockholders by their showing even that the bills were irregularly, clandestinely or corruptly issued by the officers intrusted by the corporation with the power of issuing them. Nothing short of collusion with such fraudulent officers, or actual notice of their fraudulent dealing, and some participation in it by the party seeking this remedy, can deprive him of it. The fact that bank bills are taken of a broker at a discount, and on an agreement that they shall not be put into circulation within a limited period, at a time of great scarcity of money, when many and various financial expedients were resorted to, both by individuals and by corporations, is not constructive notice to one taking them that they were issued clandestinely by the officers, and not by the full authority of the banking corporation."

The authorities now cited seem sufficient to establish the conclusion that, from the nature of bank bills, the mere

fact of possession by the holder and owner of the unpaid bills of the bank, is sufficient, in the absence of any proof to the contrary, to establish the ownership of the said demands; and that it is of no consequence when, whether before or after failure, or at what price, whether for little or much, the said bills were obtained by the plaintiff. They are the unpaid obligations of the bank; the plaintiffs are the *bona fide* holders and owners thereof, and they are therefore entitled to bring this suit.

IV.

What effect, if any, upon this liability, was produced by the Act of the Legislature of South Carolina, entitled "An Act to enable the banks of the State to renew business, or to place them in liquidation." (14 Stat. at large 212.)

The position of the appellants in the Court below was, that the act in question works an absolute forfeiture of the charter of the bank, and that upon such dissolution or forfeiture, all debts to and from the bank were extinguished, according to what the appellants call the old common law doctrine.

We maintain, (1) that the act in question was intended only to declare a *cause* of forfeiture, and (2) that this *cause* of forfeiture can only be taken advantage of by a direct proceeding instituted for that purpose by the State itself.

In discussing these questions, it will be of the first importance to examine this act fully and carefully.

The Court will observe that the title of the act in question is, "An Act to enable the banks of the State to renew business, or to place them in liquidation."

The title of the act in this instance is significant, and will afford some aid in discovering the true purport of the act itself. At the time of the passage of this act, several banks heretofore chartered by the Legislature had, owing to the effects of the war, been obliged to suspend business, and their affairs, at that time, had not been adjusted. It was in view of this condition of the banks that the act was passed, an act whose object is stated to be, to enable such banks "to renew business or to place them in liquidation." The meaning of the phrase "renew business" cannot be

doubtful, and will not require discussion. The other phrase, "place them in liquidation," is susceptible of scarcely more doubt. "Liquidation" is defined by Webster to mean "the act of settling and adjusting debts, or ascertaining their amount or balance due." The title of the act would therefore be merely paraphrased as follows: "An Act to enable the banks of the State to renew business, or to ascertain and adjust their debts or the amount or balance due."

The Constitution of South Carolina contains the following provision: (Art. 2., Sec. 20.) "Every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title."

The title of the act in question, therefore, must be regarded, at the very least, as of some weight in fixing the true construction of the act itself. And the title, in this instance, plainly does not express the idea of a dissolution or forfeiture of corporate existence, but by implication, and upon the maxim, *expressio unius exclusio alterius*, excludes such a construction.

The act, in its first section, provides that all banks incorporated under the authority of this State and which have issued bills of credit, known as bank bills, and have failed to comply with their charters by refusing to pay their bills, and are now thus failing, "and shall so continue to violate said act of incorporation until the 1st day of December, 1869, shall forfeit all corporate rights and privileges, and are forbidden to transact any business as banking institutions."

Section 2 provides, that if the said banks shall agree to redeem their bills, the Comptroller-General shall give notice of such agreement, and shall notify the Judge of the Circuit of each and every bank failing to comply with the requirements of the first section of the act, whose duty it shall be to appoint a suitable person as Receiver of said bank, who, after having filed a bond, shall take charge of the property and assets of the bank.

Section 3 requires the receiver to furnish the Comptroller-General with a statement of the property and assets of the bank, and to proceed to a final settlement of the accounts of the bank, in conformity to such rules as the Circuit Court may direct.

The remaining sections of the act relate exclusively to the resumption of business by such banks as may be able to comply with the conditions of the act.

It is now argued that the operation and effect of this act, as bearing upon the corporate character of this bank, is the same as if the Legislature had, in terms, repealed its charter, and consequently, that it has no longer existence as a corporation.

It is not questioned but that the Legislature had full authority to repeal the charter under the reservation of authority contained in the 41st section of the Act of 1841: (Stat. at large, vol. 11, p. 162), which is as follows: "It shall become part of the charter of every corporation, which shall, at the present or any succeeding session of the General Assembly, receive the grant of a charter, or any renewal, amendment or modification thereof, unless the act granting such charter, renewal, amendment or modification shall, in express terms, except it, that every charter of incorporation granted, renewed or modified, shall, at all times, remain subject to amendment, alteration or repeal by the legistative authority."

The act renewing the charters of the banks in question did not except the charters of these banks from the operation of this section. The only question is whether such power of repeal has been exercised in the act in question.

This question has already been decided in the Supreme Court of South Carolina, in the case of *Ahrens* v. *State Bank*, 3 S. C. 401, and we deem it necessary only to present the reasoning and conclusions of the Court upon these points. After stating the question involved, the Supreme Court says:

* * * * * * * *

"The general rule of law, applicable to such a case, is laid down by Angell & Ames on Corporations, section 777, as follows: 'A cause of forfeiture cannot be taken advantage of, or enforced against the corporation, collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation, so that it may have an opportunity to answer, and the government creating a corporation can alone take such a proceeding, since it may waive a broken condition of a compact made with

it as well as an individual.' Chancellor Kent advances the same doctrine in *Slee* v. *Bloom*, 5 Johns., 366.

The authorities just quoted recognize two elements in the question whether a judgment establishing a forfeiture under such an act as the present one is essential for the dissolution of a corporation: one is the nature of the liability to which the corporation is subject, and the other is the character of the corresponding right to enforce such forfeiture as vested exclusively in the State. Such statutes as the present one are not *self-executing;* they are in their operation and effect conditional. They either prescribe a rule of conduct or forbid certain actions, attaching a penalty to a violation of such requirements. In the case of corporations the penalty is frequently a loss of corporate rights. This penalty, although peculiar to corporate bodies, does not differ in principle from any other of the customary classes of penal statutes. Such laws are not self-executing, for it cannot be affirmed upon the ground of legal construction of the statute alone that such a specific corporation has become dissolved. Before such a result can be reached, a state of facts must be ascertained. The corporation, to be affected by the statute, must be brought within its terms by the proof of the facts showing it to have come within the cause contemplated by the statute as a ground of dissolution. A judgment upon such proof is essential to connect a delinquent corporation with the statute. The judgment excludes the corporation from the benefit of the condition, and subjects it to the penalty declared. Therefore it follows that before any Act creating a duty, either affecting individuals or corporations, and prescribing a loss of property or rights, as the consequence of a violation of such duty, can operate to produce such an effect, there must be a direct judicial act ascertaining the grounds of such forfeiture. The reason given by the authorities quoted why a judicial proceeding is requisite—namely, that the corporation has a right to answer—shows that the proceeding must be an ordinary judicial proceeding, as contradistinguished from an informal or *ex parte* proceeding.

"The State alone has the right to enforce this penalty. It may waive the forfeiture, if public policy would be

better subserved thereby. The corporation cannot take advantage of its own wrong, nor claim to have become dissolved in virtue of its own illegal misconduct. If it possessed such a right, it might retain its corporate privileges long enough to reap some particular benefit for its stockholders, and then by a wrong committed by itself lay claim to escape its duties to the public by self-assumed dissolution."

From the foregoing remarks it will be readily perceived that the appointment of a Receiver under the statute in question is not such a judicial proceeding as can operate to dissolve this corporation. * * * *

"The fair and reasonable construction of the statute is, that it does not dispense with the necessity of a judgment of dissolution before the corporate character is lost, nor with the necessity of a regular proceeding, based upon proof of the facts, bringing the corporation within the statute; nor can it be said that the appointment of a Receiver to take possession of the assets cannot be made before or without a judgment of dissolution, for the two acts are not necessarily connected by the statute."

In the case of *Slee* v. *Bloom*, to which the Court referred, a suit had been brought against the individual shareholders to charge them personally for a judgment debt of the company, on the ground that the corporation was dissolved, and that under the Act of 1811 the individual stockholders thereby became responsible for the corporate debts. Chancellor Kent says: "The first and leading question is, whether the corporation is dissolved, so as to enable the plaintiffs to call upon the individual members. A corporation aggregate may be dissolved within the period prescribed by its charter, in certain modes and upon certain events. It may be dissolved if it becomes incapable of continuing its corporate existence, as by the death of all its members, or the destruction of an integral part of it, or it may be dissolved by surrender of its franchises into the hands of the Government, or by the forfeiture of its charter through abuse or neglect of its franchise. The last is the alleged ground of forfeiture in this case, but I apprehend that the forfeiture in such

case must be judicially ascertained and declared, and that the power which may have been abused or abandoned cannot be taken away but by regular process. The judgment in such cases is that the party be ousted, or that the liberty be seized into the hands of the Government." Chancellor Kent then refers to the case of *King* v. *Emory*, in the King's Bench, 2 Term Reports, 515, where it was assumed as an undeniable proposition that a default of a corporation must be judicially determined in a suit instituted for that purpose.

If, therefore, it be admitted that it was the intention of the Act of March 13, 1869, to declare a cause of forfeiture, and that this is fairly embraced within the title of the act, it still remains true in law that that cause of forfeiture can only be taken advantage of by the State itself, by a formal and regular and direct judicial proceeding, wherein the corporation itself shall have an opportunity to appear and answer. Certainly no such proceeding has as yet been had or commenced.

V.

One question remains, which is, in some sort, raised by the pleadings and which, perhaps, deserves notice. The record (folios 92 and 99) shows the plea that the expiration of the charter extinguished all debts due by the corporation. The position is that the debts being extinguished as to the corporation, are extinguished as to the stockholders.

By an Act to recharter the Merchants' Bank of South Carolina, at Cheraw (Stat. at Large, Vol. 12, p. 286), the charter of the bank was continued *for twenty-one years from January* 1, 1855. That period expired *January* 1, 1876. If the Court shall take judicial notice of this fact, the question will be presented, of the effect of the expiration of the charter, although the decree in the present suit was made prior to such expiration of the charter.

1. Reference is made for this doctrine by the appellants to 2 Kent, 307, where it is said: "According to the old

settled law of the land, where there is no special statute provision to the contrary, upon the civil death of a corporation all its real estate remaining unsold reverts back to the original grantor and his heirs. The debts due to and from the corporation are all extinguished."

But in a note to this passage the author says: "The rule of the common law has in fact become obsolete and odious. It never has been applied to insolvent or dissolved moneyed corporations in England. The sound doctrine now is, as shown by statutes and judicial decisions, that the capital and debts of banking and other moneyed corporations constitute a trust fund and pledge for the payment of creditors and stockholders; and a Court of Equity will lay hold of the fund and see that it be duly collected and applied. The death of a corporation no more impairs the obligation of contracts than the death of a private person."

1. The corporation and the corporators are, in law, totally independent persons, having distinct and separate interests in the property of the corporation.

Van Allen *v.* Assessors, 3 Wall., 584.
Belcher *v.* Wilcox, 40 Geo., 399.

2. The stockholders and the corporation being distinct persons, can contract with each other and with third parties in their individual capacity.

Waring *v.* Catawba Co., 2 Bay., 109 (decided in 1797).
Tileston *v.* Newell, 13 Mass., 406.

3 If the liability of the stockholder is a liability declared by the charter, then every creditor can enforce this liability in the same manner that he could enforce an express written agreement of the several stockholders to pay the debts of the corporation to the amount fixed by the charter.

The correctness of these propositions will hardly be questioned.

Does the expiration of the charter render these principles inapplicable to the case of negotiable obligations issued by a corporation whose charter has expired, the pay-

ment of which obligations the stockholders have assumed by accepting the charter and holding stock thereunder.

This question has been carefully examined by the Supreme Court of Georgia, and the doctrine has been there firmly established that the dissolution of a corporation or the expiration of its charter does not carry with it the extinguishment of the obligations due by it for which stockholders are individually liable.

The first case where this was determined is *Lane* v. *Morris*, 8 Geo., 468.

This was an action at law brought by the plaintiff in error against Morris, defendant in error, to recover from him the amount of his liability for unpaid bills of the Planters' and Mechanics' Bank of Columbus.

The Section of the bank charter imposing individual liability is as follows:

"SEC. XI. The persons and property of the stockholders shall be pledged and held bound in proportion to the amount of shares and the value thereof that each individual or company may hold in said bank, for the ultimate redemption of the bills or notes issued by said bank, in the same manner as in common actions of debt, &c. (*Prince's Digest of Laws of Ga., p.* 127).

One of the pleas relied on by the defendant was that by the forfeiture of the charter of the bank on June 13, 1848, the defendant's liability had ceased.

The Court below sustained this plea, but the Supreme Court reversed the decision. In giving the opinion of the Court, LUMPKIN, *J.* said: "When the defendant made himself a stockholder, by subscription or purchase, he became ultimately bound to pay the bills and notes of the bank by an express stipulation, to which he voluntarily assented for his own benefit, and his individual property and credit were thereby pledged to each holder of the bills and notes to fulfill this stipulation; and it is upon this undertaking, which no power can impair, that this proceeding is instituted" (p. 477).

In *Hightower* v. *Thornton* (8 Ga., 486), a similar decision was rendered. This was an equitable action to compel

stockholders of the same corporation as that referred to in *Lane* v. *Morris*, to pay into Court the unpaid balance due on their subscriptions to the capital stock of the bank.

The Supreme Court held that the right of action was not lost by the forfeiture of the charter of the bank.

In *Thornton* v. *Lane* (11 Ga., 459), the same question is again raised in an action at law upon the liability of a stockholder in the same corporation. Judge Lumpkin again delivered the opinion, and reaffirmed the principles declared in *Lane* v. *Morris* and *Hightower* v. *Thornton*.

Lane v. *Morris* (16 Ga., p. 217), was another action at law founded on the eleventh section of the charter of said Planters' and Mechanics' Bank of Columbus. The Supreme Court held that plaintiff was entitled to recover notwithstanding the forfeiture of the charter.

In *Moultrie* v. *Smiley*, 16 Ga., 290, the same question is again raised and determined according to the authorities just cited.

This was an action at law, brought against plaintiffs in error, as directors of the Commercial Bank of Macon, to recover from them the amount of certain judgments held against the bank on the ground that by the charter of the bank the directors were liable for its debts over and above three times the amount of stock paid in.

The defendants pleaded the general issue, and subsequently an additional plea that *since the last continuance of the cause*, the corporate existence of the bank had expired by its own limitation, whereby the corporation became extinct, and all debts and liabilities due to or from the corporation became extinct also.

The Court was divided in opinion, but Judges Lumpkin and Starnes, composing the majority of the Court, concurred in their conclusions that the expiration of the charter of the bank did not extinguish the personal liability of the directors for the obligations of the bank. Judge Lumpkin, in the course of his opinion, makes a full and exhaustive examination of all the authorities on this subject, and shows the origin and reason of the com-

mon law rule that on the dissolution of a corporation the debts due from it are extinguished, and shows wherein this rule cannot be applied to the independent and separate contracts which corporations enter into with their and the corporation's creditors.

A single selection only is made from this opinion:

"Where two or more persons are jointly but not severally liable on a simple contract debt, a judgment obtained against one is, at common law, an extinguishment of the claim on the other debtor. But here the corporation and the directors are severally and not jointly liable, the one in their collective, and the other in their individual character. And yet it is contended that the discharge of the debt by operation of law as to one is a discharge of both.

No one doubts the power of this and other banks to draw, accept or indorse bills and promissory notes. Suppose a bill had been drawn by an individual or another bank, and accepted by the Commercial Bank of Macon; and the latter failing at maturity to pay, the paper had been protested, and notice given to the drawer before the expiration of the charter; would there be any question as to the liability of the drawer?

So, if the Macon Bank had been the maker of a negotiable note which was subsequently indorsed, the liability of the indorser would be indisputable, notwithstanding the expiration of the Macon Bank charter." (pp. 318–9.)

In *Robinson* v. *Lane*, (19 Ga., 337,) decided in 1856, the Court reiterates its judgment that the forfeiture of the charter of the Planters' and Mechanics' Bank of Columbus did not extinguish the *debts* due by the bank. (p. 346.)

In *Robinson* v. *Beall*, (26 Ga., 17,) decided in 1858, the effect of the expiration of the charter of the said Planters' and Mechanics' Bank of Columbus, upon the liability of its stockholders for the ultimate redemption of its bills, was again before the Court for decision. This time the judgment of the Court was adverse to its previous rulings, Judge Benning delivering the opinion.

But Judge Lumpkin filed a dissenting opinion, in which he reviews his former opinions in *Moultrie* v. *Smiley*, *Robinson* v. *Lane*, &c., and with great earnestness and

much vigor of expression, he re-affirms his settled convictions on this point.

After these conflicting opinions came the case of *Hargroves* v. *Chambers*, (30 Ga., 580,) wherein the same question is again raised as to the same bank. This case was decided in 1860, Lyons, *J.*, delivering the opinion ot the Court.

The action was brought to trial in the Court below, in 1859. The charter of the bank, had it not been forfeited, would have expired by limitation in 1857. This fact was urged as one of the grounds why the bill-holder could not recover.

But the court held that the expiration of the charter did not extinguish the liability of the directors who were sued in this case, and re-affirmed the decisions in the cases of *Hightower* v. *Thornton* and *Thornton* v. *Lane*. One of the concluding points of the opinion in this case, is as follows:

"Suppose, however, that we admit that the debt of the corporation is extinguished by its death, how does that affect the liability of these directors? Their liability is independent entirely of that of the bank, and exists for a different reason. They are, by the charter, to be liable for this debt in their individual capacity. What does the continuance or dissolution of the corporation have to do with the individual rights or liabilities of its members? Nothing whatever. The liability of the director is created by his own act, and in derogation of the chartered privileges, is not dependent on its continuous existence, and its failure does not protect him; but it does and must remain *until satisfied* or released by act of the creditor." (p. 606.)

On the soundness of the reasoning of Judge Lumpkin and Judge Lyons in the cases cited, we could well rest this part of our case. The parallel between the case last cited and *Moultrie* v. *Smiley* and the one now under consideration, is striking.

In both the decided cases, the bill holders sought to recover from directors, because of a liability created by the charter, for an excess of indebtedness incurred by the corporation while they were directors.

In both cases, the charter expired by limitation before final judgment was rendered, and this fact was pleaded in

bar of a recovery. But in both cases, the Court held that the individual liability of the directors to the creditors was not a liability of the *corporation*, and that such liability continued, notwithstanding the dissolution of the corporation, until satisfied by the directors, who were the debtors, or until the creditor had released them from such liability.

In the case of *Mumma* v. *Potomac Co.* (8 Pet., 281), the plaintiff in error recovered a judgment against the Potomas Co. for the sum of $5,000. No steps were taken to enforce the judgment until ten years later, when a writ of *scire facias* was issued to revive it. The case was continued until 1830. In the meantime the Potomac Co. had surrendered its charter and had become extinct. Mr. Justice Story, in delivering the opinion of the Court, said that "There is no pretense to say that a *scire facias* can be maintained and a judgmeut had thereon against a dead corporation any more than against a dead man. We are of opinion that the dissolution * * cannot in any just sense be considered an impairing of the obligations of the contracts of the company * * any more than the death of a private person can be said to impair the obligation of his contracts. *The obligations of those contracts survive*, and the creditors may enforce their claims against any property belonging to the corporation," &c.

This decision has been repeatedly referred to and approved by this Court. If it be correct, it furnishes a complete answer to the theory that on the expiration of a charter of a corporation, all debts due to and from it are extinguished, *ipso facto*.

If there be property of the corporation, it can be reached by proper process, and applied towards the payment of its obligations.

If, after the debts are paid, there is any surplus, such surplus belongs to the stockholders and must be distributed to them. *Bacon* v. *Robertson*, (18 How., 480).

In *Curran* v. *State of Arkansas*, (15 How., 304,) the doctrine of the common law that by the dissolution of a corporation, its contracts are extinguished, is expressly repudiated on the authority of *Mumma* v. *The Potomac Co.*, (p. 310–11).

Lenox v. *Roberts*, (2 Wheat., 373,) was a suit in equity, brought by persons to whom, at the expiration of the charter of the Bank of the United States, its effects were transferred, against an indorser of certain promissory notes included among the said effects. The Court did not give any opinion as to whether an action *at law* would lie upon these notes by the assignee, but did decide that a suit in equity might be maintained against the indorsers.

This case, therefore, settles the point that the expiration of a charter does not estinguish the liability of debtors of the corporation.

The following cases have important applications to the the present case:

Ochiltree v. *Railroad Co.*, 21 Wall, 249. In this case the constitution of Missouri made each stockholder in a corporation "individually liable over and above the stock by him or her owned and any amount unpaid thereon, in a further sum at least equal in amount to such stock." Under this provision a direct liability was held to arise *for the debts of the corporation*, by the State Court. Upon appeal this Court says, "The law of the contract in this case undoubtedly gave the plaintiff the right to subject existing stockholders in the corporation with whom the debt was contracted to the double liability provision. This provision could be invoked so soon as the assets of the corporation were exhausted. * * * The incident of individual liability attached to and formed a part of the contract as long as it lasted. * * * If the corporation itself cannot pay, the members who composed it at the time of the repeal are unaffected by it, and there is nothing in the way of subjecting them to the double liability provision."

In this case it will be observed that the language creating the individual liability is in general terms only, as in the case under argument. It is not expressly declared to whom or for what they shall be liable, but no difficulty

seems to have been felt in reaching the conclusion that they are liable (1) for the debts of the corporation, (2) to the creditors of the corporation, and (3) that this liability may be enforced by any appropriate legal or equitable remedy.

National Bank v. *Colby*, 21 Wall, 609. This case was strangely cited in the argument of *Carrol* v. *Green*, 92 U. S., 509, as sanctioning the doctrine that upon the dissolution of a corporation all its debts were extinguished. The only point in the case applicable to the case under argument is that which decides that a suit against a National Bank to enforce the collection of a demand is abated by a decree of a District Court of the United States dissolving the corporation. Nothing is said which suggests that its debts are extinguished or that the liability of its property and funds for such debts is released, or especially that the liability of stockholders, under a clause imposing an individual liability, is affected by the dissolution of the corporation.

Hawthorne v. *Calef*, 2 Wall., 21. In this case this Court held that a State statute repealing a former statute making the stock of stockholders in a chartered company liable for the corporation's debts, is, as to existing creditors, void. This Court refers with favor to *Corning* v. *McCullough*, 1 Comst., 47, and held that "by the clause in the charter subjecting the property of the stockholder, he becomes liable to the creditors, in case of the inability or insolvency of the company, for its debts, to the extent of his stock. The creditor had this security when the debt was contracted with the company, over and above its responsibility."

Garrison v. *Howe*, 17 N. Y., 458. In this case the Court of Appeals held that a creditor of a corporation, whose stockholders are made individually liable, may proceed by suit, in the nature of a common law action, against a single stockholder; that in such suit the stockholder can defend by showing that he has already paid in account of the debts of the corporation, a sum equal to the liability the statute has imposed; and, that a stock-

holder thus sued to enforce his individual liability, in a case where an accounting and enforcing of all such liabilities would relieve him from the whole or a part of the debt claimed, may himself institute a suit for such account and for contribution.

Weeks v. *Love*, 50 N. Y., 568. In this case the Court of Appeals held that under a charter making stockholders "severally individually liable to the creditors of the company" the right to bring suit against a single stockholder is clear, and that this is a several and distinct right of the creditor and not a joint right of creditors generally; but that the Court *may*, in a proper action, provide for taking an account and enforcing the liability of all the stockholders for the benefit of all the creditors entitled to share in the fund collected from the stockholders. The Court refers in this case with favor, to the doctrines laid down in *Garrison* v. *Howe*.

We have no answer to make to much that will be urged upon this Court, if counsel shall follow their own example in the Court below, or in Carroll *v.* Green. This Court will not require to be cautioned against the influence of such remarks. The principal appellee's character or motives are not here in question. Neither are the character or the self-inflicted misfortunes or losses of the appellants. Each party is here to receive the award which the law, unaffected by any extraneous considerations, may render, upon the record presented in this case. The duty of presenting the legal aspects of the case in behalf of the appellees being discharged, this Court should not be asked to listen to other considerations.

D. H. CHAMBERLAIN,
For Appellees.

Military Orders referred to in the preceeding Argument.

HEADQUARTERS SECOND MILITARY DISTRICT.

CHARLESTON, S. C., April 11th, 1867.

GENERAL ORDERS.
No. 10.

The general destitution prevailing among the population of this Military District cannot be relieved without affording means for the development of their industrial resources. The nature and extent of the destitution demand extraordinary measures. The people are borne down by a heavy burden of debt; the crops of grain and garden produce failed last year; many families have been deprived of shelter; many more need food and clothing; needful implements and auxilliaries of husbandry are very scarce; the laboring population in numerous localities are threatened with starvation, unless supplied with food by the Government of the United States; the inability of a large portion of the people to pay taxes leaves the local authorities without adequate means of relief; and the gravity of the situation is increased by the general disposition shown by creditors to enforce, upon an impoverished people, the immediate collection of all claims.

To suffer all this to go on without restraint or remedy is to sacrifice the general good. The rights of creditors shall be respected; but the appeal of want and suffering must be heeded. Moved by these considerations, the following regulations are announced: They will continue in force, with such modifications as the occasion may require, until the civil government of the respective States shall be established, in accordance with the requirements of the Government of the United States.

The Commanding General earnestly desires and confidently believes that the observance of these regulations, and the co-operation of all persons concerned in employing fairly and justly the advantages still remaining to them, will mitigate the distress now existing; and that the

avenues of industry, enterprise, and organization thus opened, will contribute to the permanent welfare and future happiness of the people.

I. Imprisonment for debt is prohibited; unless the defendant in execution shall be convicted of a fraudulent concealment or disposition of his property, with intent to hinder, delay and prevent the creditor in the recovery of his debt or demand. And the proceedings now established in North and South Carolina, respectivly, for the trial and determination of such questions, may be adopted.

II. Judgments or decrees, for the payment of money, on causes of action arising between the 19th of December, 1860, and the 15th of May, 1865, shall not be enforced by execution against the property or the person of the defendant. Proceedings in such causes of action, now pending, shall be stayed; and no suit or process shall be hereafter instituted or commenced, for any such causes of action.

III. Sheriffs, Coroners, and Constables, are hereby directed to suspend for twelve calendar months the sale of all property upon execution or process, on liabilities contracted prior to the 19th of December, 1860, unless upon the written consent of the defendants, except in cases where the plaintiff, or in his absence his agent or attorney, shall upon oath, with corroborative testimony, allege and prove that the defendant is removing, or intends fraudulently to remove, his property beyond the territorial jurisdiction of the Court. The sale of real or personal property by foreclosure of mortgage is likewise suspended for twelve calendar months, except in cases where the payment of interest money, accruing since the 15th of May, 1865, shall not have been made before the day of sale.

IV. Judgments or decrees entered or enrolled, on causes of action arising subsequent to the 15th of May, 1865, may be enforced by execution against the property of the defendant; and in the application of the money arising under such executions regard shall be had to the priority of liens, unless in cases where the good faith of any lien shall be drawn in question. In such cases the usual mode

of proceeding adopted in North and South Carolina, respectively, to determine that question, shall be adopted.

V. All proceedings for the recovery of money under contracts, whether under seal or by parol, the consideration for which was, the purchase of negroes, are suspended. Judgments or decrees entered or enrolled for such causes of action, shall not be enforced.

VI. All advances of moneys, subsistence, implements and fertilizers, loaned, used, employed or required for the purpose of aiding the agricultural pursuits of the people, shall be protected. And the existing laws which have provided the most efficient remedies in such cases for the lender, will be supported and enforced. Wages for labor performed in the production of the crop shall be a lien on the crop, and payment of the amount due for such wages shall be enforced by the like remedies provided to secure advances of money and other means for the cultivation of the soil.

VII. In all sales of property under execution or by order of any court, there shall be reserved out of the property of any defendant, who has a family dependent upon his or her labor, a dwelling house and appurtenances and twenty acres of land for the use and occupation of the family of the defendant; and necessary articles of furniture, apparel, subsistence, implements of trade, husbandry or other employment, of the value of five hundred dollars. The homestead exemption shall inure only to the benefit of families—that is to say, to parent or parents and child or children. In other cases, the exemption shall extend only to clothing, implements of trade or other employment usually followed by the defendant, of the value of one hundred dollars. The exemption hereby made shall not be waived or defeated by the act of the defendant. The exempted property of the defendant shall be ascertained by the Sheriff, or other officer enforcing the execution, who shall specifically describe the same and make a report thereof in each case to the court.

VIII. The currency of the United States, declared by the Congress of the United States to be a legal tender in

the payment of all debts, dues and demands, shall be so recognized in North and South Carolina. And all cases in which the same shall be tendered in payment, and refused by any public officer, will be at once reported to these Headquaters or to the Commanding Officer of the Post within which such officer resides.

IX. Property of an absent debtor, or one charged as such, without fraud, whether consisting of money advanced for the purposes of agriculture, or appliances for the cultivation of the soil, shall not be taken under the process known as "Foreign Attachment;" but the lien created by any existing law shall not be disturbed, nor shall the possession or the use of the same be in any wise interfered with except in the execution of a judgement or final decree, in cases where they are authorized to be enforced.

X. In suits brought to recover ordinary debts, known as actions *ex contractu*, bail as heretofore authorized, shall not be demanded by the suitor, nor taken by the Sheriff or other officer serving the process. In suits for trespass, libel, wrongful conversion of property, and other cases known as actions *ex delicto*, bail as heretofore authorized may be demanded, and taken. The prohibition of bail in cases *ex contractu*, shall not extend to parties about to leave the State; but the fact of intention must be clearly established by proof.

XI. In criminal proceedings, the usual recognizances shall be required and taken by the proper civil officers heretofore authorized by law to take the same. *Provided:* That upon complaint being made to any magistrate or other person authorized by law to issue a warrant for breach of the peace, or any criminal offence, it shall be the duty of such magistrate or officer to issue his warrant upon the recognizance of the complainant to prosecute, without requiring him to give security on such recognizance.

XII. The practice of carrying deadly weapons, except by officers and soldiers in the military service of the United States, is prohibited. The concealment of such weapons

on the person will be deemed an aggravation of the offence. A violation of this order will render the offender amenable to trial and punishment by Military Commission. Whenever wounding or killing shall result from the use of such weapons, proof that the party carried or concealed a deadly weapon, shall be deemed evidence of a felonious intent to take the life of the injured person.

XIII. The orders heretofore issued in this Military Department, prohibiting the punishment of crimes and offences by whipping, maiming, branding, stocks, pillory or other corporal punishment, are in force and will be obeyed by all persons.

XIV. The punishment of death in certain cases of burglary and larceny, imposed by the existing laws of the provisional governments in this Military District, is abolished. Any person convicted of burglary; of larceny when the property stolen is of the value of twenty-five dollars; of assault and battery with intent to kill; or of any assault with deadly weapon, shall be deemed guilty of felony, and shall be punished by imprisonment at hard labor for a term not exceeding ten years nor less than two years, in the discretion of the Court having jurisdiction thereof. Larceny, when the value of the property stolen is less than twenty-five dollars, shall be punished by imprisonment at hard labor for a term not exceeding one year, in the descretion of the Court.

XV. The Governors of North and South Carolina shall have authority, within their jurisdictions respectively, to reprieve or pardon any person convicted and sentenced by a civil court, and to remit fines and penalties.

XVI. Nothing in this order shall be construed to restrain or prevent the operation of proceedings in bankruptcy, in accordance with the Acts of Congress in such cases made and provided, nor with the collection of any tax, impost, excise, or charge levied by authority of the United States or of the provisional Governments of North and South Carolina; but no imprisonment for overdue taxes shall be allowed. Nor shall this order or any law of the provisional governments of North or South Caro-

lina operate to deny to minor children, or children coming of age, or their legal representatives, nor to suspend as to them, any right of action, remedy, or proceeding, against Executors, Administrators, Trustees, Guardians, Masters, or Clerks of Equity Courts, or other officers or persons, holding a fiduciary relation to the parties or the subject matter of the action or proceeding.

XVII. Any law or ordinance, heretofore in force in North or South Carolina, inconsistent with the provisions of this General Order, is hereby suspended and declared inoperative.

By Commmand of Major General D. E. SICKLES,
J. W. CLOUS,
Capt. 38th U. S. Inft.
A. D. C., & A. A. A. G.

OFFICIAL:
J. W. CLOUS,
Aide-de-Camp.

HEADQUARTERS SECOND MILITARY DISTRICT,
CHARLESTON, S. C., December 31, 1867.

GENERAL ORDERS, NO. 164.

I. Paragraph II of General Orders No. 10, from the Headquarters of the Second Military District, dated April 11, 1867, is modified as follows:

Judgments or decrees for the payment of money on causes of action arising in North Carolina, between the 20th day of May, 1861, and the 29th day of April, 1865, and in South Carolina between the 19th day of December, 1860, and the 29th day of April, 1865, shall not be enforced, by execution, against the person or property of the defendant. Proceedings for such causes of action now pending, shall be stayed, and no suit or process shall be instituted or commenced on such causes of action until after the civil government of the respective States shall be established in accordance with the laws of the United States.

Paragraph III of the same order is modified as follows:

Sheriffs, coroners, and constables, are hereby directed to suspend the sale of all property upon execution, or process under any judgment or decree of a court of the so called Confederate States, or of the State of North Carolina rendered between the 20th day of May, 1861, and the organization of the provisional government of said State, under the President's proclamation of the 29th day of April, 1865, or of the State of South Carolina, rendered between the 19th day of December, 1860. and the organization of the provisional government of the said State, under the President's proclamation of the 30th day of June, 1863, unless the written consent of the defendant be entered of record, and except in cases where the plaintiff, or his attorney, upon oath, supported by corroborative testimony, shall allege that the defendant is disposing of, removing, or about to remove, his property beyond the jurisdiction of the Court with intent to defraud his creditors; *provided*, that no such judgment, so rendered, within the periods aforesaid, shall be a bar to the commencement, in a State Court, of a new suit upon the same cause of action in any case in which by law the defendant may remove or appeal the same to a Court of the United States.

The sale of real or personal property, by foreclosure of mortgage, is likewise suspended in the cases embraced in paragraphs II and III of said order No. 10 as above amended, except in cases where interest money accruing subsequent to the 29th of April, 1865, shall not have been paid before the day of sale, and all previous restrictions on such sales are revoked.

Paragraph IV of the same order is modified by substituting the 29th day of April, 1865, for the 19th day of May, 1865.

Paragraph V of the same order is modified as follows:

All proceedings for the recovery of money on contracts, whether under seal or by parol, the consideration of which was the purchase of slaves, made subsequent to the 1st day of January, 1863, are suspended. Judgments or decrees entered for such causes of action shall not be enforced.

Paragraph VII of the same order is modified as follows: In all sales of property under execution or by order of any Court, there shall be reserved out of the property of any defendant who has a family dependent upon his or her labor, a dwelling house and appurtenances, and (if in the country) twenty acres of land, or so much thereof that the whole shall not exceed in value the sum of two thousand dollars; and in a town or city, the immediate lot upon which such dwelling house is situated; and necessary articles of furniture, apparel, subsistence and implements of husbandry, trade, or other employment, to the value of five hundred dollars. The homestead exemption shall inure only to the benefit of families. In other cases the exemption shall extend only to clothing and implements of trade or employment usually followed by the defendant, of the value of two hundred dollars. The exemptions hereby made shall not be waived or defeated by the act of any defendant who has a family dependent upon him or her for support, and the exempted property shall be ascertained and defined by the sheriff or other officer enforcing the execution, who shall call to his aid two impartial citizens to make the necessary appraisement, and shall make report thereof to the Court.

Paragraph X is hereby modified so as to authorize arrest in civil actions *ex contractu* only in cases where the demand is past due and the defendant has been guilty of a fraud in contracting the debt sued for, or has removed or disposed of his property, or is about to do so, with intent to defraud his creditors, or is about to leave the State with such intent.

Paragraph XVI is amended by adding thereto, All proceedings in any Court of North Carolina, or of South Carolina, recognizing or sanctioning the investment of the funds of minor heirs, or of females, or of insane persons, in the securities of the late rebel government, or the securities of the States of North Carolina, or South Carolina, created for the purpose of carrying on war against the government of the United States, will be suspended until the question of the validity of such investments shall have been determined by the courts of the United States, or by national legislation. And nothing in the provisions of

this order, or of the order No. 10 above cited, shall be held to bar or hinder the recovery, by suit, of the estate of any minor heir, female, or insane person, (*cestui que trust,*) whether in the hands of executors, administrators, trustees, guardians, masters or clerks of equity courts, and other fiduciary agents, or invested by them in their fiduciary character.

II. General Orders No. 25, of May 20, 1867, is revoked; and on and after the first day of January, 1868, the distillation of spirituous liquors in this Military District will be subject to such restrictions only as are imposed by the laws of the United States and of the States of North and South Carolina, respectively.

III. Paragraphs VI. and VII. of General Orders No. 32, dated May 30, 1867, are revoked, and the power to grant licenses for the sale of spirituous or intoxicating liquors is remitted to the proper local authorities, to take effect on and after the first day of January, 1868, and to be subject to the following conditions:

1. The municipal authorities granting the license shall be answerable that the parties to whom such licenses are granted, together with their sureties, shall be responsible persons, and of good moral standing in the community, and that both principal and sureties shall be able to qualify individually in double the amount of the bond required, and that the bond shall be a lien upon the personal property of both principal and sureties, and upon proof of default shall warrant the summary seizure and sale of so much of the property of either or both as may be necessary to satisfy the forfeiture or fine and costs.

2. Drunkenness or disorderly conduct on the premises shall work the forfeiture of the license and of the penalty of the bond.

3. The owner or keeper of any bar room, saloon or other place at which intoxicating liquors are sold, and all other persons interested or connected therewith, shall be regarded as principals in any action of damages growing out of any assault, riot, affray or other disorder occurring on the premises, or directly traceable thereto.

4. All bar rooms, saloons or other places at which intoxicating liquors are sold, shall be closed on the day or days of any general or local election, and for the twelve hours next preceding the opening and next succeeding the closing of the polls at such election; and the sheriffs of Counties and Districts, and the chief of police of cities and towns, shall have power to direct the closing of bar rooms and other places for the sale of intoxicating liquors whenever it may be necessary in their judgment to preserve order and quiet.

5. The proceeds of licenses, forfeitures and fines, under the local regulations or under the provisions of military orders, will be devoted to the support of the poor, and as soon as realized will be turned over to the commissioners or overseers of the poor of the District, County, city or town in which they accrued, and the commissioners or overseers will at the end of each month report to the Provost Marshal General of the District the amount received by them during the month, specifying the names of the parties from whom it was received.

The penalties imposed by this order or by the local police regulations may be enforced in any civil or military court, and upon conviction the court may award to the informer a sum not exceeding fifty per cent. of the forfeiture or fine. And it is made the duty of all sheriffs, constables, and coroners of Counties and Districts, and the police of cities and towns, to be vigilant in the enforcement of the police regulations and the provisions of this order in relation to the sale of intoxicating liquors.

The provisions of this paragraph will be held to apply to such licenses granted under General Orders No. 32, to innkeepers, as remain unexpired after the 1st of January, 1868.

IV. To promote the speedy trial of prisoners confined for minor offenses, and diminish the cost of their maintenance, all committing magistrates will on the 15th and last days of each month, report to the Judge of their County or District Court all commitments made by them during the preceding half month, specifying the date of commit-

ments, the names of the prisoners, and the offenses for which they were committed, to the end that the Judges may, whenever in their opinion the number of prisoners or other considerations of public interest call for it, hold special terms of their courts, for the purpose of disposing of such cases. The additional expense of holding such special terms will be a charge upon the State Treasury. and the accounts therefor will be audited and paid as accounts of a similar character are now audited and paid, and if the salaries now paid the Judges should be inadequate in view of the additional labor performed by them, a reasonable addition, upon proper representations through the Governor of the State, will be allowed.

V. The pilotage regulations now existing in the States of North and South Carolina, are so far modified that on and after the first day of March, 1868, all passenger steam vessels, regulated by the laws of the United States, and carrying a pilot commissioned by the United States Commissioners, shall be exempt from the compulsory payment of pilotage.

VI. So much of the Act of the General Assembly of the State of North Carolina, entitled "An Act to raise monies," ratified on the 26th day of February, 1867, as makes it "the duty of all persons and corporations to list and pay the [poll] tax of such persons liable to the same, as are in their employment, on the first day of April of each year, as laborers," is rescinded, and hereafter all individual taxes will be assessed directly upon and collected directly from the individuals from whom they are due: *provided*, that the provisions of this order shall not apply to the taxes levied for the current year, except that double poll tax shall not be enforced if the original tax be paid on or before the first day of March, 1868.

By Command of Brevet Major-General Ed. R. S. Canby:

LOUIS V. CAZIARC,
Aide-de-Camp,
Actg. Asst. Adjt. Genl.

Official:

LOUIS V. CAZIARC,
Aide-de-Camp.

Supreme Court of the United States.

OCTOBER TERM, 1877.

No. 168.

WILLIAM GODFREY, Receiver of Merchants' Bank of South Carolina, at Cheraw, et al., *Appellants,*

vs.

HARVEY TERRY, et al., *Appellees.*

Appeal from the Circuit Court of the United States for District of South Carolina.

Argument in behalf of Harvey Terry.

R. O. Polkinhorn, Printer, 532 and 534 D Street, Washington, D. C.

1

In the Supreme Court, United States.

OCTOBER TERM, 1877.

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2

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Appeal from the Circuit Court of the United States for District of South Carolina.

3

Argument in behalf of Harvey Terry.

Statement.

This suit is brought on behalf of the complainant and all other creditors in like condition, who are holders of the bank-bills of the Merchants' Bank of South Carolina, 4 to subject the stockholders of said bank to the payment of the debts of said bank under the statute of charter of the bank. (Record, folios 6–7.)

The liability of the stockholders of said bank to pay the debts of the bank under the charter, is enacted in the renewal of the original charter—Vol. 12, Statutes of South Carolina, page 221, as follows, to wit: 5

"Sec. IV. That in case of the failure of said Merchants' Bank of South Carolina, at Cheraw, each stockholder, copartnership, or body politic, having a share or

shares in the said bank at the time of such failure, or
6 who shall have been interested therein at any time within twelve months previous to such failure, shall be liable and held bound individually for any sum not exceeding twice the amount of his, her, or their share or shares."

And the renewal and continuation of the charter of said bank was made and continued for twenty-one years from the 1st day of January, 1856.—That is to say, the
7 charter of said bank continued and existed until January 1st, 1877.

The original grant of charter is found in Vol. 8, Statutes of South Carolina, page 68.

The debts of the bank proved in this action are founded on the bank-bills of the bank issued and circulated as money (Record, folios 103–114,) at a gold value, in con-
8 formity to its charter, before August 7, 1861, as shown by an agreed statement of facts filed in the cause (folios 126–7).

The liability of the stockholders to pay the debts of the bank under the statute of charter, is denied by the defendants.

The joint and separate answer of Wm. Godfrey, presi-
9 dent, and George W. McIver, et al., directors, admits that the bill sets forth correctly the facts connected with the charter of the bank; that it became organized as stated; that it carried on the business of banking under the provisions of said charter, and issued bills to a large amount.

Under the provisions of the act of the General Assembly of the State, passed on the day of A. D. 1860,
10 the bank suspended specie payments, and could not in consequence thereof redeem its promises. * * * Thereafter there were no transactions with the bank but in Confederate money, and on the 1st day of March,

1865, the bank could have met promptly in Confederate money all its transactions. 11

When peace was restored, and with it the currency was destroyed, the bank found itself unable to meet its notes which were for the first time presented, as it would have been at any time after the act of the Legislature respecting specie payments had any bills been presented for payment. (Record, folios 57-8.)

Further answering, said directors admit, that in conse- 12
quence of the failare of said bank to meet its notes, it came within the Act of the Assembly of March 13th, 1869, and was placed in the hands of Wm. Godfrey as receiver. (Record, Folio 59.)

The separate answer of Wm. Godfrey, receiver, shows that the assets of the bank in his hands are worthless, and that he had been able to collect nothing from said as- 13
sets, but that the estate of said bank was indebted to said receiver for costs expended in the cause as said receiver. (Folio, 55.)

The joint and several answers of Henry McIver, A. D. Chapman, J. F. Matthewson, L. M. Coker, Wm. Godfrey, Geo. W. McIver, J. H. McIver, and the executors of Caleb Coker, deceased, and Jas. D. Aiken, sets forth 14
as follows: "They also admit that the bank was organized under its charter, and that it did the ordinary business of banking, besides issuing notes or bank bills, which passed everywhere, and were received as money. They also admit that the bank came within the general provisions of the Acts of Assembly of the said State, with regard to payment of specie by the banks of the State; and they admit that in the act of 1853, in order to secure 15
the persons who, * * * * * * * * accepted these notes, the State of South Carolina, in the grant of the renewal of charter made provision for the

liability of stockholders in case of the failure of the bank
16 to meet its obligations, &c. They further admit that the bank carried on business until sometime in 1865, when it closed its doors, (Folios, 62–3) * * * *. The Merchant's Bank of South Carolina, at Cheraw, had been in successful business up to the period of the late civil Commotion; before the happening of that event, it suspended specie payments with the full concurrence and
17 assent of the Legislature of the State. (Folio 63.) * *. The bills of this bank ceased early during the war to pass as money or currency, and just as the war ended they lost altogether the ordinary or general character of a bank bill, depreciated greatly in value, and became articles of Commerce, &c, (Folios 63–4.) * * * *. Further answering, these defendants deny that they are liable in any form to the complainant by reason of any-
18 thing he has stated in his complaint. (Folio, 24.)

Further answering said defendants say that the said bank did, some time in the year 1861, lend to the Confederate Government its bills and notes, that the same might be used in aid of the war, (Folio 70.) * * * and that its bills and notes so lent, were so used by the Confederate Government, and that the bills and notes so
19 used were illegal and void, and of no value. (Folio 70.)" The proof in the cause fails to show that any bank bills of said bank were paid directly to said Confederate Government; but the evidence does show that said bank bought most of its Confederate securities with Confederate money (except about $50,000 of the first loan was paid for in specie, (Folio 121–2.) and this answer is contradicted by the proof in the cause. (Folio 122.)

20 That no proof in the cause shows that any loans of the bank bills of said bank, were made to the Confederate Government as set up in the several answers filed, but the proof is directly the reverse, and that the Confederate

securities of the bank were bought with gold and Confederate money. (Folio 121–2.) 21

That said Merchants' Bank of South Carolina at Cheraw, suspended specie payments, in common with all other banks in the State, on the 29th of November 1860. (Folio 125.)

The answer of John Fraser & Co., sets up; "That holders and owners are bound to set forth at what time they received said bills and notes, and what consideration passed from them for said bills; they also deny that 22 the complainant has any claim against them, which is not barred by lapse of time, (they fail to say barred by the statute of limitations, and fail to point out any statute that bars the complainant's action.) (Folio 77.) These defendants deny that the complainant has set forth the date of the failure of said bank, (Folio 83); while the complaint sets out the first day of March as the date of 23 failure (Folio 7), and the finding of the master establishes that date as the date of failure. (Folio 115.) The bank continued its general banking business until March 1st 1865, and declared a dividend to its stockholders on the first day of January 1865. (Folio 115.) The master also finds the names of the stockholders correctly set out in the complaint, (Folios 116–7.) and the shares held by 24 each correctly stated, and the decree is drawn in conformity to the master's report.

The master finds the amount of bank bills held by each of the creditors of said bank (Folios 103–4), and that the same are correctly stated in the decree; except $1,230. proved by Harvey Terry and omitted by mistake to be included in the decree. (Folio 104.)

The answer of A. B. Springs, sets up the defence: 25

First. That the cause of action stated in the bill dd not accrue within four years before the exhibiting thereof. (Folio 90.)

to make redemption of his individuel liability to cred-
36 itors, does not belong to the corporation to redeem, nor exist as a liability due to the corporation. It exists as an idemnity to the creditors of the corporation. The bank-bill filed as vouchers in the cause, established the indebtedness of the corporation; the indebtedness of the corporation being established, the statute quoted and set out in the bill establishes the indebtedness of the stockholders, defendants. The liability is individual as
37 to the stockholders of the bank. It is limited to double the amount of the value of the shares held by said stockholder, that is to say, the liability is liquidated and set out. The special sum for which each stockholder is liable, is determined by the number of shares held by him, and not by the sum that the bank may owe. This liability is determined on the principle of an indemnity.
38 The charter allows the corporation to issue its bills to three times the amount of its capital, which is an estate upon condition. (8 Statute S. C., pa. 72; Sec. XVII.) And the stock being paid at par before the bank could go into operation, secures the one third of indebtedness that could be legally created, and the individual liability of each stockholder to double the amount of the value of
39 his shares, indemnifies and secures to the creditors of the bank for the remaining two-thirds of the indebtedness of said bank.

This was the theory of the legislature granting the franchise, one part of the debts of the corporation was secured by the capital, the other two parts of said indebtedness was secured by the indemnity imposed by the statute on the individual stockholders. The estate upon condition was
40 secured by indemnity to the bill-holders. The liability of the stockholder as an indemnity to the creditor is direct and individual; thus, a stockholder owning ten shares, is liable to the creditors of the bank for $2,000,

(and whatever the indebtedness of the bank, his liability is confined to that sum,) by his user of the franchise 41
the statute has made him liable for that sum, (not proportionately or *pro-rata*, but) individually. A, being a creditor of the bank at its failure, for $100, sues said stockholder individually, and collects his money; B, being a creditor of the bank at is failure for $500, sues said stockholder individually and collects his money; C, being a creditor of said bank at its failure for $3,000, 42
sues said stockholder individually and collects $1,400, and C is estoped from making any further collection from said stockholder; and why? Because said stockholder by his user of the franchise, by the acts of himself and his agents by force of law, became bound individually to the creditors of the bank, to the extent of $2,000. When his liability to creditors of the bank is exhausted, he is discharged. 43

This liability of the stockholders to pay the creditors of the bank is not founded on any promise of said stockholder made to any of the creditors of the bank, but said liability of said stockholder exists by force of the statute alone. An assumpsit would not lie because of the want of the promise or contract between the complainants and defendants, stockholders, whereon to found an assumpsit; between these parties no contract exists, verbal or 44
written, and the defendants' liability is wholly dependant on performing a duty which the law enjoins. The defendants, by the organization of the corporation and user of the franchise, said corporation circulated its bills upon each and every of the creditors of the bank, and as the indemnities for the corporation to secure the performance of the condition, the stockholders are each in- 45
dividually liable to the creditors of the corporation, to the extent prescribed by the statute. The liability of the defendants is strictly statutory, and exists in no other

way; and that liability exists for the time during which
46 the statute was enacted and existed by force of law.

7 Comyn's Dig. Stat., (G.—15) 415;
1 Shars. Blackstone,* 184–5;
1 Bouvier's Institutes, 48, § 8, ¶ 112.

Argument of Law.

This action is founded on the 4th section of the Act of
47 December 20th, 1853, re-chartering and continuing the franchise of the Merchants' Bank of South Carolina, at Cheraw. (Vol. 12, Statutes, 221.)

The defendants are all stockholders of said Merchants' Bank, and if liable to pay the debts of the bank at its failure, they are made so liable by this act.

The liability of the stockholders to pay the debts of
48 the bank is repugnant to the law of corporations—Angel & Ames on Corporations, § 605—but the statute qualifies in this case an exemption that would otherwise exist.

James P. Carroll, et al., vs. *J. & T. Green*, 92 Otto, 509.

The joint and several answer of Henry McIver, A. D. Chapman, I. F. Matthewson, L. M. Coker, W. Godfrey,
49 G. W. McIver, J. H. McIver, and the executors of Caleb Coker and James D. Aikin, admits that by the Act of 1853, in the grant of the renewal of charter, made provision for the liability of stockholders in case of the failure of the bank. (Record, folio 62.) Further answering, these defendants deny that they are liable in any form to the complainant by reason of anything he has stated in his complaint (fol. 64.) (And these defendants
50 further answering, deny there is a right of action given to any person or persons whomsoever; that these complainants have no right under the said section to institute or maintain their complaint, * * that the relief sought

for can only be had in the name of the State for the benefit of all parties who may be entitled to relief, &c. (folio 69.)

These answering defendants having admitted that the enacting of said 4th section was to give currency to the bills, and to secure the persons, who, relying on the sanction and authority given by the State to said bank to issue its bills and to give currency to them as money, &c. (folio 62), almost excludes the necessity for making an argument to whom said stockholders are liable upon the failure of the bank. But in previous legislation we have this question authoritively defined by the Legislature itself.

That by the 6th section of the Act of December 19, 1812, to establish a bank on behalf and for the benefit of the State, said charter makes the following provision: "In case of an excess of issues of the bank, the directors under whose administration it shall happen shall be liable for the same in their private capacities, and an action of debt may be brought against them or any of them by any creditor of the corporation, * * * and may be prosecuted to judgment and execution; but this shall not exempt the bank from also being held liable for the same, and upon their insufficiency the State of South Carolina from being also liable for and chargeable with the said excess. (Vol. 8, Statutes of S. C., 25.) And this same feature is included in this charter. (8 Statutes, 72, § 17.)

This act was followed by various amendments, admitting private stockholders in said bank of the State, with this significant provision: "Fifth. And be it further enacted, that the private stockholders shall be liable for the debts, losses, and liabilities of said bank in proportion to the capital owned by them." (8 vol. Statutes, 0, sec. 5.

This act was followed by Act of December 19, 1833)

to renew the charter of the State bank. (Sec. 2.) That
56 in case of the failure of the said State bank, each person, body corporate, or copartnership, who at the time of its failure holds, or for six months previous thereto has held any share or shares therein, shall be held liable and bound, both as individuals and corporate bodies respectively, to make good the debts of said bank to an amount not exceeding double the share or shares so owned by
57 such person, body corporate, or body politic respectively. (8 vol. Statutes, 68.) If said stockholders were liable to the State, why insert this clause in said act?

The first experiment of banking in the colony and State of South Carolina, was under the Act of June 17, 1712, known as the "Bank Act," whereby bills of credit
58 were issued (signed, sealed, and stamped as a specialty) as a legal tender to individuals, to use and circulate as money, by said individuals giving security by bond and mortgage to indemnify the public against loss. (9 vol. Statutes, 759.

This system of issuing and circulating bills of credit as a legal tender for debts, having the validity of an instrument under seal, continued until the close of the
59 revolutionary war. 4 Vol. Statutes, 461.

All of the bills of credit issued under the Colonial Assembly, were sealed and circulated as a sealed instrument. This last act was followed by act of February 6, 1782, repealing all acts making bills of credit a legal tender.

This last act was followed by the act of March 24,
60 1785, known as the County Court act—section 44 reads as follows: "And be it further enacted, by the authority aforesaid, That all judgments, bonds, bills, promissory notes, or other writing, with or without seal, where the

debt or demand is liquidated and signed by the hand of the debtor, such writing shall constitute specialty for 61
such debt, and all suits to be commenced thereon in the county courts shall be by action of debt; any law, custom or usage to the contrary notwithstanding, 7 vol. Statutes 232, Sec. 44, and said section 44 stands on the statute books of South Carolina as the statute law of the State to-day, 1 Bay S. C., 445; although it has been held that by repealing the act holding said county court, by implication repealed said section 44, but that said act existed 62
with force of law until and after the system of banking was established in South Carolina in 1801, there can be no doubt. Are these statutes in *pari materia*, with the laws of issuing bank bills.

It is the rule of construction of statutes, "says Lord Mansfield," that all laws which relate to the same subject, 63
notwithstanding that some of them may be expired, or not referred to, must be taken to be one system and construed consistently. *Rex* vs. *Loxdale*, M. S., report quoted, Bacon Abridg. Stat. I. 8. And Dwarris says, p. 192; "according to the received doctrine, as a repealed act 'obliterated' from the judicial mind and considered as if it never had been passed, will often have more legal import a century later from aiding the construction of subsequent 64
statutes, than it ever possessed *in viridi observantia*."

The corporate franchise upon which this action is founded, is a grant upon condition to certain persons known as stockholders. By the user of the franchise, said stockholders acquired the right to create an estate of paper tokens, in a certain form, and to circulate the same upon the public as money of a gold value to the amount 65
of one million two hundred thousand dollars. One-third part of this vast estate was secured by the paid up capital of the bank, and the creditors of the corporation

were further secured from loss by said stockholders stand-
66 ing as indemnity or security to the creditors of said bank
in case of its failure.

Sec. 16 of said charter, 8 statutes p. 72, sets out the authority to issue the bills of said bank and create the indebtedness of the incorporation sued on. And Sec. 17, following, sets out: "And in case of excess of debts issued by the said bank, the directors under whose ad-
67 ministration such excess shall happen, shall be liable for the same in their private and individual capacity, and an action may be brought against them, or any of them, * * * by any creditor or creditors of said corporation, and may be prosecuted to judgment and execution."

This section would seem to express very clearly to
68 whom the right to sue for the debts of the corporation belongs; the legislature says emphatically: "Any creditor may sue any of said defendants' directors, in their private and individual capacity, &c."

Now let me quote the 4th section of the renewal of said charter, 12, vol. statute 221, dissected and separated; and what is the evident and common sense construction of the intentions of the legislature in framing
69 said section in said charter:

"Sec. 4. *That in case of the failure of said bank*, (at that date,) *each stockholder, co-partnership, or body politic, having a share or shares therein at the time of such failure, or who shall have been interested therein at any time within twelve months previous to such failure, shall be liable* (to pay to those persons holding the notes or obligations of said bank,) *and*
70 *held bound*, (the terms of a bond, and evidently meant as though under seal, bound by force of the statute, the highest record known in law;) *individually* (to any creditor of the bank,) *for any sum not exceeding twice the*

amount of his, her or their share or shares, (liable not as a principal, his liability is not co-extensive or co-existent with the corporation, but liable only in case of the bank's failure; and bound as an indemnity to the creditors of the corporation, bonded for a liquidated amount, bonded for all of the debts of the bank individually, to the extent of double the value of the shares held; the liquidated sum being paid, he is discharged from all further liability." 71

72

If the stockholder is primarily liable as a principal who had signed the note at the bottom, then he would be held upon the contract and promise in the bill to pay the bearer on demand, and assumpsit would lie upon the promise; but the liability of the stockholder is repugnant to the laws of corporations, unless the statute does specially so enact. Angel & Ames on corporations, § 598; 92 Otto, 509; *Carroll* vs. *Green*. And by this statute the stockholder is not made a principal at the issue of the bill, he simply is held bound (in the contingency) as an indemnity to the creditor at the failure of the bank. By the user of the franchise he assumed the liability individually "*cum onore*" strictly construed under the statute; and as beneficaries in the franchise, the statute should be construed strongly against the defendants. 9 Cushing, 199, *Gray* vs. *Coffin*. 73 74

The law is not to be stretched for the protection of stockholders; neither is the force of the statute to be diminished to screen the liability of the stockholders to indemnify the creditors. Common sense the rule; 22 Wallace, 592; *Ross* vs. *Jones*. And these defendants by their answer (folio 62–3) admits that the State of South Carolina, in the grant of the renewal of charter, made provision for the liability of stockholders in case of the failure of the bank. 75

The object of the Legislature in enacting said 4th Section
76 (as admitted in said answer quoted) was to give currency to the bills, and also to protect the public from loss by making the stockholders indemnities to secure the holders of said bills in case of the failure of the bank. This is the reasonable construction of the charter. And the legislature in the act of March 13, 1869, section 1, have very conclusively indicated to whom the stockholders are liable. The last clause of said section is in these
77 words: "Provided, that the redemption of their bills in United States currency should be deemed the fulfilment of their obligations to the holders of said bank bills." 14 Vol. Stat. 212.

Here we have the direct authority of the legislature of the State, saying that the banks have failed; and that said suspension of business or failure shall be excused
78 upon the payment of greenbacks to the holders of the bank bills of said banks. "To whom liable?" To the holders of the bills? "For what liable? For the current money of the United States? How liable? Liable in debt, with like force and effect as if upon any person or persons. Charter 8, Statutes 72, sections 16 and 21.

79 But appellants say these liabilities all refer to the corporation; true. But to whom does the life of the corporabelong after it has committed acts in violation of its chartered privileges? *To the State.* *Ahrens* vs. *State Bank*, 3 Richardson, N. S., 401. Angel & Ames on corporations Section 777. To whom does the forfeiture of the charter belong? To the State the parent of the corporation? *Who made the bank bills sued on, and gave authority to the*
80 *corporation to circulate the same as money on the public?* The State. The franchise granted is the sovereign will of the legislature; without the charter the bank bills would have been null and void. To whom does the debt sued on be-

long? To the bearers of the bills? To those who received them as money? To the legitimate owners for value? 81
That is true. and the legislature have confirmed that fact, by the provision in section 1, of the act of March 13, 1869. 14 Statutes S. C. 212.

3 Comyns Dig., Debt A—1, page * 381;
3 " Dig., Covenant A—4, page * 265½;
8 Wallace opin. 63–4, *Furman* vs. *Nichols.*

But we are not suing the corporation (the principal debtor that circulated the bills under the statute) we are 82
suing the indemnities of the corporation (bonded sureties) "liable and held bound at its failure" by force of the statute; not as the makers and issuers of the bills or creators of the debt sued on: but we are suing the stockholders as the idemnity liable for the debt due only on the contingency of the failure of the bank; and the evidence of *that* indemnity is of record as a specialty of 83
the highest order; the act of the legislature. the sovereign will recorded in the statute. 1 Shars. Blackstone, Bk 1, * 185, 2 *b.* An act of Parliament &c., King's Statute the highest record of the realm.

Westm'r Primer, page 186, 2*b.*
5 Comyns Dig., * Parl. (H—1) page * 285, *R*—3, page * 314.
6 Bacon Abr., page 377, D. & 378, Note 2. 84
2 Baily S. C., 51; *Wright* vs. *Hamilton.*
1 Speer's Law, S. C., 516–7; *State* vs. *Bk. of S. C.*
3 Strobhart's Equity, S. C., 351; *Johnson* vs. *S. W. R. R.*

Bonded individually for the whole debts of the bank payable to the creditors of the bank to the extent qualified and limited in the statute;-liquidated and limited to 85
double the value of the shares held. Each for himself individually for the whole liability to the extent liquidated.

56 Geo., 563, *Boyd & Son* vs. *Hall.*

In case of over issue of the bills by the directors, said
86 directors are made each individually liable in an action brought by any creditor or creditors of the bank; then why not the stockholders as the indemnities so liable to the creditors of the bank in the same forms.

Are not these acts all in "*pari materia*," all enacted and intended by the legislature as a part of the same system, to wit: To protect and indemnify the holders and bearers
87 of the bank bills; if not, why insert the 4th section at all?

20 Wallace opin. 526–7; *Pollard* vs. *Bailey.*

This is an action of debt on a record, not on any promise, lending or contract.

11 Georgia opin. 520; *Thornton* vs. *Lane.*

But these defendants have not plead nul-tiel record;
88 they admit the record.

Liability of stockholders a *quassi* contract.

1 Bouvier Institute, Sec. 907, Note *a.*

1 " " Sec. 908.

These implied contracts may be made by any person *sui juris*, and by a corporation aggregate.

7 Cranch 307; *Bank of Columbia* vs. *Patterson.*
89
91 Otto, opin. 68–9–70; *Webster* vs. *Upton Assn.*

A person may make himself liable by adding his credit to that of another, but conditional, only in case of the other's default.

1 Bouvier Institutes, Sec. 913, Par. 3.

And this is the exact condition of the defendants to the
90 present action; they became liable only in case of default of the bank; individually liable as though no corporation existed, to the extent of the indemnity pledged—(*quassi contractus*)—to double the value of the stock.

As I have shown, the liability of stockholders for the corporate debts is not a common law liability, it is re- 91
pugnant to the laws of corporation. Angel & Ames on Corporations, Sec. 598. And an action for the corporate debts against stockholders lies only on the statute. 20 Wallace, 525; *Pollard* vs. *Bailey*.

"Liability of stockholders, not a simple contract nor a specialty, for nothing is a specialty but a writing under seal; but it is a *quassi* contract in the nature of a speci- 92
alty, being of as high evidence of indebtedness as any specialty can be. That twenty years is the proper bar to actions brought to enforce the obligation it imposes."

11 Georgia opin., 502¼; *Thornton* vs. *Lane*.

In *Hinsdale* vs. *Larnerd*, 16 Mass., 68–'9, Justice WILDE in that case says: "It has been argued that the liability of the defendant is only co-extensive with the liability 93
of the corporation, but this is not so, for their respective liabilities stand on different grounds; the one being bound absolutely to pay the notes issued and put in circulation, and without any collateral proof; and the other being under no obligation whatever, unless they had transcended the limits of their powers as directors."

In the case at bar, no liability exists whatever against the stockholders, unless the failure of the bank is con- 94
clusively proven, and the debt of the bank is clearly shown to exist. (Record, folio 7.)

This right of action in this suit, is not given by parol, nor does not depend upon any writing, covenant, contract, or agreement between the parties to the action, but its validity depends alone on the statute of record in the law. If the charter and franchise existed of record 95
and of force in the law, then this liability existed of record and of force by proof of the existence of the debt; and that proof exists by force of the record in the

enactment of the statute. No liability can lie against
96 the stockholders unless the debts of the bank are clearly shown to exist unpaid, either by the production of the notes or by some other proof equally valid, as by judgment against the bank, &c. (50 Geo. 285.)

In *Curran* vs. *State of Arkansas*, 15 Howard, 313, the Court say: "We have thus far considered only the contracts between the complainants and the bank, arising
97 out of the bills of the bank held by them. But if a person deposit his property in the hands of an agent, he may revoke the agency and recall the deposit at pleasure. But if he should request third persons to accept the agent's bills, informing them at the same time that he had placed property in the hands of that agent to meet the bills at maturity, and upon the faith of such assurance the agent's bills are accepted, the principal cannot,
98 by revoking the agency, acquire the right to withdraw his property from the hands of the agent.

"It is no longer exclusively his. They who on the faith of its deposit have changed their condition, have acquired rights in it. * * * And when a third person acted on this assurance and parted with his property on the faith of it, the transaction had all of the elements
99 of a binding contract, and the State could not withdraw the fund nor any part of it without impairing that obligation."

So the stockholders in the present action, by the user of the franchise, assumed obligations that survive the corporation. They created an estate upon condition, in the hands of their agent, the bank, and pledged in trust
100 their private estate or indemnity, each for himself individually, that in case of condition broken and estate determined, then he would be individually liable and held bound (bonded, sealed, by evidence of the statute of rec-

ord, in the law,) to the extent and in manner and form prescribed in the statute. The trust was voluntarily assumed by the defendants, and the rights of third parties have attached under it. The complainants parted with their property on the faith of it. The transaction had all the elements of a binding contract. The obligation is outstanding and unpaid; and in the language of Justice McAllister, (1 McAllister, 497, *Sparks* vs. *Pico*,) he who would avoid said liability must show payment. 101 102

In the case of *Terry* vs. *Calnan, Receiver, et al.*, in the superior court of Richland County, S. C., referred to and quoted by the appellants, in delivering that opinion, Carpenter, Justice, says; "The law has created a direct liability, a liability as direct and cogent as though the defendants had bound themselves under seal to pay the amount. The law esteems this an obligation of the highest kind of specialty." (Manuscript opinions.) 103

By the user of the franchise, the stockholders act *sui juris*, (1 Bouvier Inst., S. 907, note *a.*) and *quassi contractus* assume the obligation *cum onore*, (3 Mason, 312,–4, *Wood* vs. *Dummer*) and are bound by all of the terms of the statute strictly construed. 22 Wallace, 592–4, *Ross* vs. *Jones*.

A statute must be construed not only by its exact words, but also by its apparent purpose. 22 Wallace, 492, *United States* vs. *Sanders*. 104

The liability arose by the user of the franchise; the indemnity was pledged by the acts of the grantees; not by the promise or contract, but by force of the statute.

The purpose of the act (or rather that section of the act relied on) was to give currency to the bills sued on, and to create an indemnity to secure their payment as the debts of the bank to the bearers thereof (as admitted in the directors answer folio 62) in the contingency of the failure of the bank. 105

The 4th section of the renewal of the charter was to
106 indemnify and save harmless the bearers of said bank's bills, the creditors of the bank in the contingency of its failure. This was the evident design and intention of the legislature in enacting said 4th section; and this is the common sense construction of the statute.

9 Bacon Abridg, (stat.—I) pages 247, 250, 256.

6 Wallace, Opin., 395–6, *United States* vs. *Hartwell.*

107 The defendants' plea is "that said 4th section was intended only to arise when said bank refused to redeem its issues in gold or silver coin, and that at such time when said bank refused to redeem it fails in its obligation to the State and to those who then are the holders of said bank bills taken or accepted as money, * * * and deny that complainants received the bank notes
108 vouchers in the suit as money; and deny that the statute creates any liability for the payment of the debts sued on in consequence of complainants having purchased the bills, vouchers in the action, below their face value." Folios 65–6.

Complainants submit that the defendants' plea is repugnant to the statute, and that said defendants' plea does
109 violence to the intentions of the legislature of South Carolina enacting said statute. It cannot be a reasonable construction of the intentions of said legislature of South Carolina to say "that said legislature would enact a law declaring the liability of said defendants, stockholders of said Merchants' Bank, under the statute upon a condition, (as an idemnity upon the contingency of the failure in the grant) and after said defendants had (as stock-
110 holders) participated in and reaped the benefits of said grant for many years, and then upon condition broken, and the liability of the defendant accruing under the statute; that said defendants should be freed and dis-

charged from said liability by a common law construction of the act of incorporation; whereas by a strict con- 111
struction of the charter, they are liable as said stockholders or indemnities to pay the debts sued on in this action."

The presumption of law is, *that the Legislature did do in fact what they plainly purported to do in the act.* They intended to make the stockholders (as the beneficiaries in the grant) liable as the indemnities, (to the creditors of 112
the corporation) so as to secure the payment of the debts incurred to the bearers of the bills. This plea of the defendants ignores the intentions of the Legislature and the authority of the Legislature to create said liability. If the defendants' plea be true and avails as plead, then the complainants submit that the common law rules the statute in this action; whereas the decisions are, that where the statute prescribes a certain form or rule of ac- 113
tion in derogation of common law, that form and rule must be construed and pursued strictly.

9 Bacon Abridg., Stat. (G.—1), 286½;
1 Shar's Blackstone, bk. 1, page 88, par. 7.

The sovereign will is the law, and of highest dignity.
1 Shar's Blackstone, book 1, *185–6;
20 Wallace, 525, *Pollard* vs. *Bailey.* 114

This plea of the defendants, in substance, alleges that the bank-bills of said bank, upon the insolvency of the corporation, lost their quality of a medium of circulation, and degenerated into a right of action only, at some indefinite period of time before March 1, 1865; and that the right of action of the then bill-holder accrued at that date against the then stockholder. If this action was 115
brought under the common law against a mercantile firm for notes of hand issued, the common law rule then would apply; but this action being brought on the stat-

ute, against the stockholders as indemnities for the cor-
116 poration in case of its failure, then the statute, strictly construed, must rule the action. Complainants' right of action is a "*jus ad rem*, and not a *jus in re*." They do not claim as a right of action in the bills, vouchers in the cause, they claim from the defendants, as indemnities, to pay the debts of the Merchants' Bank. "*Prout Debuit.*"

By the admitted statement of facts—folio 126—"The
117 Merchants' Bank of South Carolina suspended specie payments at the same time with the other banks of the State; was so suspended in November, 1860, and never after resumed specie payments."

By the answer of the board of directors, it is admitted said Merchants' Bank of South Carolina suspended specie payments under the provisions of the act of Assembly of South Carolina, passed on the day of ,
118 A. D. 1860, which said suspension of specie payments was legalized by subsequent acts of the State during the war. (Folios 58–9.)

This suspension of specie payments by said bank was made in accordance with the then policy of the State as a needful regulation of its affairs, in exact conformity to the 2d section of the renewal of charter, as follows: "And
119 said bank shall be subject to all the provisions of an act, passed December 18, 1840, entitled, 'An Act to provide against the suspension of specie payments by the banks of this State,' and also to such regulations and restrictions as the Legislature shall from time to time impose."
12 Statutes, 669.

The Act of December 18, 1840, (11 Stat. at Large,
120 43,) does not forfeit the charter by reason of the suspension of specie payments by said bank. Said Act of December 18, 1840, only imposes a penalty on the corporation for the violation of it; and in this case the

penalty is waived by the State itself as a necessary regulation.

But complainants submit *the law to be* "that a general suspension of specie payment by the banks of the State is not a legal failure."

1 Speer, South Carolina, Opin. * 458½–9, also page 472; *State* vs. *Bank of South Carolina.*

8 Georgia 476, (6) Secondly; *Lane* vs. *Morris.*

2 McMullin 440 * 449–51; *State* vs. *Bk. of Charleston.*

22 Wallace 590–1–2; *Ross* vs. *Jones.*

The proof is that said Merchants' Bank continued to do a general banking business until March 1865, and declared a dividend to its stockholders on January 1, 1865. (Record, folio 122.) It is also admitted in the answer of defendants (folio 63) "that the bank carried on business until some time in 1865, when its doors were closed. It is also shown that said Merchants' Bank of South Carolina, did make a return and official statement of the property, assets and liabilities of the Merchants' Bank of South Carolina, at Cheraw, on November 1st, 1869, to the Comptroller General of the State in pursuance of law, as shown in the public documents submitted by the Governor to the General Assembly of South Carolina, at its regular session in November, 1869.

If said Merchants' Bank failed in 1860, why did said corporation continue to do a general banking business until March, 1865, and to declare a dividend to its stockholders out of profits earned on its capital up to January 1, 1865, and moreover to make a report of its condition up to November 1, 1869, to the proper officer of the State. The assertion of a legal failure of said Merchants' Bank in November, 1860, is an absurdity too great to require serious argument; the mere statement of the facts, that said bank continued to receive deposits, pay its checks,

discount bills, notes and drafts, make collections, meet
126 its current obligations, declare and pay dividends out of the current earnings to its stockholders for a period of 5 y ears after the time designated, as a failure, *is a sufficient refutation of the plea*, and the rulings of the Supreme Court of the State have authoritively decided this point, that *the suspension of specie payment, without a suspension of business, is not a legal failure.*

127 1 Speer, South Carolina, 518–23; *State* vs. *Bank of South Carolina.*

2 McMullin South Carolina, * 449–51; *State* vs. *Bk. of Charleston.*

8 Georgia 476, (6) Secondly; *Lane* vs. *Morris.*

And the proof shows that the bank closed its doors in March, 1865, (folio 63 and 122) and that its failure was
128 caused by the close of the war and the destruction of Confederate money thereby as currency, which the bank used as money to that date. If the closing of the doors of the bank and ceasing to do business as a banking corporation, constitutes a legal failure, then the findings of the master, *that said bank failed March* 1, 1865, is correct. (folio 114–5.) No protest of the bank issues have been shown, nor any suit against the corporation, before the
129 appointment of a receiver under the act of March 13th, 1869. The proper officer made a legal report to the Comptroller General of the State, showing a statement of the affairs of the bank November 1, 1869 (see document of reports submitted to the General Assembly general session 1869); and said bank waived protest on its said bills March 3, 1869, (folio 103) and therefore said
130 bank must have been in existence at that date and the proper officers assumed to act for the corporation at those dates.

The question arises whether the master's finding of

the date of failure (March 1, 1865,) was the correct time of its failure. 131

The defendants except to the master's report.

1st. Because the master's report assumes the 1st day of March, 1865, (the date of the closing of the doors of the bank,) as the date of failure; when it is admitted that the bank suspended specie payments in 1860, and never resumed thereafter.

2d. That there was no other testimony than the date 132
of suspension of specie payments, by which the date of actual failure could be ascertained.

3d. That the names reported by the special master as stockholders of the bank at the time of its failure, and within twelve months previous thereto, are the names of those who were stockholders on the 1st day of March, 1865, (the assumed date of failure) and are not the names 133
of those who were such stockholders at the date of actual failure, and within twelve months previous thereto."

These exceptions were overruled by the Circuit Judge. It was considered in the Circuit Court a sufficient reply to the appellants' exceptions, to show that said suspension of specie payments was authorized by the legislature, as admitted by the defendants, (folio 63) as a 134
regulation of the banks, by the then policy of the State during the war; and that said bank had continued its business up to March 1, 1865, when it closed its doors. The war being virtually ended, the currency used by the bank, (Confederate money) became worthless at that date, and consequently the bank was insolvent. No shares were sold or transferred to other stockholders 135
after that date. The same persons that were stockholders on March 1, 1865, remained stockholders until the charter expired January 1, 1876.

After March 1, 1865, the corporation remained in a
136 state of insolvency, (without actual default, protest of its bills, or suit upon its liabilites,) until the passage of the Act of March 13, 1869, requiring the banks of the State to resume business, or placing them in liquidation.

The liability of the corporation to the bearers of the bills, (will pay the bearer on demand,) remained unbroken. The actual default of the corporation had not
137 arose at the passage of said act, (except by implication) and the question here arises contemplated in the complaint, (folio 10) did the said bank commit any act of bankruptcy or failure sufficient to bind the stockholders as indemnities, before it refused and failed to comply with the requirements of the Act of March 13, 1869, regulating and restricting the affairs of said corporation, which took effect and was of force December 1,
138 1869. The appointment of said receiver under said act, undoubtedly, was a failure of the bank.

The master having found the closing of the bank for general business to be a failure, the decree was drawn in accordance with the proofs in the cause and the finding of the master. If the finding of the master is incorrect, that error ought to be corrected.

139 *What is the effect of the act*, entitled "An Act to enable the banks of the State to renew business, or to place them in liquidation. (14 Stat. at Large, 212.)

The appellants contend that, the act in question works an absolute forfeiture of the charter of the bank, and that upon such dissolution or forfeiture, all debts due to, and from the bank, were extinguished, according to what
140 the appellants call the old common law doctrine.

1st. This complainant contends that the act in question, was a pardon and release by the State of any default or forfeiture that had been made by said Merchants' Bank

of Cheraw, prior to December 1, 1869, and said release of penalties having been enacted by the State as a regu- 141
lation of the affairs of the corporation, the corporate functions were restored and existed in their original power at that date. It is true that the bank had closed its doors for general business, but its creditors had waived their rights to present their bank-bills and to demand payment of their debts from the corporation, and consequently no actual default existed. The corporation failed
to make a general assignment, or commit other acts of 142
bankruptcy, or to call in their creditors. The stay laws of the State and the orders of the military commandant of the district, staying civil processes in actions of law, existed until July, 1868; (14 Stat. at large, 87), and from these facts, we may gain the key of the motive and intentions of the legislature in enacting said statute. That said law enacted a pardon for the past delinquencies of 143
the banks of the State, which we see by the several corporations of the State who complied with its terms, resumed and continue business to the present day.

9 Bacon's Abridg., (Stat. I.) 247.

1 Edwards' Chancery, N. Y.; *McDermot* vs. *Van Hook.*

2d. That the act in question intended only to declare 144
a cause of forfeiture, and this cause of forfeiture can only be taken advantage of by the State itself, by a direct proceeding for that purpose. "The title or preamble to the act," is the key to open the minds of the legislators to the right given, or to the remedy sought to be enforced by the law.

The court will observe that the title of the act in ques- 145
tion is, "An act to enable the banks of the State to renew business, or to place them in liquidation." The title of the act in this case is significant. It is a matter within the knowledge of every one that, at the time of

the passage of this act, the several banks heretofore
146 chartered by the legislature of this State, had, owing to the effects of the war, been obliged to suspend business, and their affairs, at that time, had not been adjusted. It was in view of this condition of these banks, that the act was passed; an act whose object is stated in the title.

The meaning of the phrase "renew business," cannot be doubtful, and will not require discussion. The other
147 phrase, "place them in liquidation," is susceptible of scarcely more doubt. "Liquidation" is defined by Webster, to mean "the act of settling and adjusting debts, or ascertaining their amount or balance due."

The importance to be attached to the title of this act is now to be considered. Titles of legislative acts have come to possess very great importance recently by reason of the constitutional provisions, which not only re-
148 quire that they should correctly indicate the purpose of the law, but which absolutely make the title to control and exclude everything from effect and operation as law which is incorporated in the body of the act, but is not within the purposes indicated in the title.

Cooley on Constitutional Limitations, 141, says:

"Every act or resolution having the force of law shall
149 relate to but one subject, and that shall be expressed in its title."

Constitution of South Carolina, art. 2, sec. 20.
52 Howard Prac. Rep'ts, 196, *Hurlburt* vs. *Banks.*

The title of the act in question, therefore, must be regarded, at the very least, as of great weight in fixing the true construction of the act itself. And the title in this
150 instance plainly does not express the idea of a dissolution or forfeiture of the corporate existence, but by implication, and upon the maxim *expressio unius, exclusio alterius*, excludes such a construction. If the actual for-

feiture is not clearly expressed in the act, and fairly set out, it cannot be construed by implication. 151

The Legislature in this act should have been deemed to have said, "*If you have forfeited your existence as a corporation legally, we, the Legislature, pardon your omission of duty, and reinstate your corporate powers and privileges; exercise them after the passage of this act, or in default, administer your assets to creditors.*"

It is now argued that the operation and effect of this 152
act, as bearing upon the corporate character of this bank, is the same as if the Legislature had in terms repealed its charter, and, consequently, that it has no longer an existence as a corporation.

It is not questioned but that the Legislature had full authority to repeal the charter under the reservation of authority contained in the 41st section of the Act of 153
1841, which is as follows: "It shall become a part of the charter of every corporation which shall at the present or any succeeding session of the General Assembly receive a grant of a charter, or any renewal, amendment, or modification thereof, unless the act granting such charter, renewal, amendment, or modification shall in express terms except it; that every charter of incorporation granted, renewed, or modified, shall at all times re- 154
main subject to amendment, alteration, or repeal by the legislative authority."

The general rule of law applicable to such a case is laid down by Angel & Ames on Corporation, section 777, as follows: "A cause of forfeiture cannot be taken advantage of, or enforced against the corporation, collaterally or incidentally, or in any other mode than a direct 155
proceeding for that purpose against the corporation, so that it may have an opportunity to answer, and the government creating a corporation can alone take such a

proceeding since it may waive a broken condition of a com-
156 pact made with it as well as an individual." And this is what the State did do by said act of March 16, 1869; it waived the default and continued the life of the bank, renewed its functions until December 1, 1869. Chancellor Kent advances the same doctrine in *Slee* vs. *Bloom*, 5 Johnson, N. Y., 366.

The State alone has the right to enforce this penalty.
157 It may waive the forfeiture if public policy would be better subserved thereby. The corporation cannot take advantage of its own wrong, nor claim to have become dissolved in virtue of its own illegal misconduct. If it possessed such a right it might retain its corporate privileges long enough to reap some particular benefit for its stockholders, and then by a wrong committed by itself lay claim to escape its duties to the public by self as-
158 sumed dissolution.

The appointment of a receiver under the statute in question, is not such a judicial proceeding as can operate to dissolve this corporation.

It is an *ex parte* application based wholly on a state of facts certified to by an executive officer alone. No intention to repeal the provisions of the general laws of
159 the State, ascertaining the rights of parties charged with violation of the laws to a regular proceeding before conviction, or loss of rights is manifested in the statute.

Nor can such intention be presumed against common right.

In the proceeding authorized by the statute for the appointment of a receiver, no provision is made for any
160 judicial act or determination intended to operate as a dissolution of the corporation, but it is confined to providing means for administering the assetts of the corporation if it fails to resume business at the date required.

This question has heretofore been decided by the Supreme Court of South Carolina, and the ruling therein 161
held that said act of March 13, 1869, did not repeal the charter of the bank.

3 Richardson, N. S., 401; *Ahrens* vs. *State Bank.*
92 Otto, 509; *Carrol* vs. *Green.*
8 Wend, N. Y., 645; *Bk. of Niagara* vs. *Johnson.*
9 do. do., 351; *The people* vs. *Manhattan Co.*

162

Again, the defendants admit (Record, folio 62,) that the 4th section quoted, was intended to give currency to the bank's bills, thereafter, to be issued by the bank, and the individual liability was intended to secure the receivers of the bills from loss in case of the failure of the bank; and this being the law, it was publicly known to be true, and upon the faith and assurance of that law, the bill-holders became the takers and bearers of the 163
bills now exhibited in proof of debt. And the State cannot, by revoking the charter, withdraw the rights of the holders of the bills to the indemnity conferred by the charter, to the payment of the debts of the bank. Upon the user of the franchise by the corporation, and the passage of the bank-bill, the bearers of the bills changed their condition upon the faith of the grant, and have ac- 164
quired rights under it. The State no longer possessed the right to dissolve the corporation, and discharge the condition. He who accepted the bank's bills as money, and parted with his property on the faith of the law, and the legality of the corporation, the transaction had all the elements of a binding contract; and the State could not withdraw the benefit of the indemnity pledged, to 165
the bearers of the debts of the bank, in case of its failure, without impairing that obligation.

The stockholders are liable only in the contingency of

the bank's failure; and that liability can be proved only
166 by the record of the statute, and the fact of failure.

What is the effect of the expiration of the charter of this bank January 1, 1876?

The defendants contend that the corporation was dissolved by the act of March 16, 1869, and that by the dissolution of the charter, all debts due by the bank are absolutely extinguished, and that, by the appointment of
167 a receiver to adjust, and settle the affairs of the corporation by the State court, the jurisdiction of this court is ousted in this action against the defendant stockholders.

This court listened to a very elaborate argument in the paralel cause of *Carroll* vs. *Green*, (92 Otto., 509,) in the Exchange Bank, during last term, where the appellants attempted to show, that by the expiration of the charter January 1, 1874, the corporation was dissolved, and as a
168 legal consequence, that all debts due by the bank were extinguished, and hence, that these stockolders are released from all liability.

The reference for this doctrine is made to 2 Kent's Commentaries, *305, where it is said, that "according to the old and settled law of the land, where there is no special statute to the contrary, upon the civil death of a
169 corporation, all of its real estate remaining unsold, reverts back to the original grantor and his heirs. The debts due to and from the corporation are all extinguished."

In a note, however, to this passage, Kent says, "This rule of the common law has, in fact, became obsolete and odious. It never has been applied to insolvent, or dissolved moneyed corporations in England.

170 The sound doctrine now is, as shown by statutes and judicial decisions, that the capital and debts of banking and other moneyed corporations, constitute a trust fund and pledge for the payment of creditors and stockholders,

and a court of equity will lay hold of the fund and see that it is duly collected and applied. The death of a 171
corporation no more impairs the obligation of contracts than the death of a private person."

This authority of Chancellor Kent would therefore seem to maintain directly the reverse of the doctrine contended for by the defendants. Among the cases cited in Kent is, *Mumma* vs. *Potomac Co.*, 8 Peters 283. In this case the question was, whether on a *scire facias*, a judg- 172
ment could be had against the Potomac Company after its dissolution. In that case Judge STORY says: "We are of opinion that the dissolution of the corporation can not, in any just sense, be considered within the clause of the constitution of the United States on this subject as impairing the obligation of contracts of the company, any more than the death of a private person can be said to impair the obligation of his contracts. The obliga- 173
tions of these contracts survives, and the creditors may enforce these claims against any property belonging to the corporation which has not passed into the hands of *bona fide* purchasers, but is still held in trust for the company or for the stockholders thereof at the time of its dissolution in any mode permitted by the local laws."

We do not claim that a judgment can be rendered 174
against the Merchants' Bank of South Carolina at this date, but simply as laid down above, that all liabilities under statute, as indemnities for the corporation, under contracts made by the bank; that all contracts made by the bank or its officers, debts, obligations and liabilities, survives the existence of the corporation; they are not extinguished by its death, but survive, and are enforci- 175
ble against any property or security which was originally made liable under the charter for their payment by the local laws.

Complainants in the present case have two rights for
176 their debt; 1st. against the property and assetts of the corporation (if any existed). 2nd. against the stockholders as the indemnity pledged by the corporation for the payment of its debts in case of its failure. But why sue the corporation? It has proved utterly insolvent without any assetts of value, and indebted to the receiver for costs expended by him in the case. (Folio 55–6.)

177 Under the 4th section quoted, the incorporated stockholders are individually liable; each one is liable for the whole debt of the bank, to the extent liquidated by the statute (56 Georgia, 563, *Boyd & Son* vs. *Hall*); that sum is double the value of the shares held, and the value of each share of said bank is $100 per share (folio 115), and the liability of each stockholder is limited to $200 per share for each and every share held
178 by him, her or them. But of the present defendants to this suit, probably not more than one-twelfth, certainly not one-eight part, are solvent, and the debt collectable, so that the only hope of the complainants for any payment beyond a mere pittance on their debts proved, consists in holding the statute inviolate; that the statute enacts the individual liability of the defendants in con-
179 tradistinction from the proportionate liability; the liability is plainly set out and declared individual, bnt no provision is made in the statute for a contribution or proportionate liability of the debts in case of the failure of the bank. It may be equitable that all of the stockholders should contribute to the common debt of the bank, but the creditors have rights conveyed by the statute, superior to, and in opposition to, the rights of the de-
180 fendants under the statute (1 Cin., Circuit Court, reports 233–6; *Wherman* vs. *Reakirt*) and the equities of the defendants cannot override the rights of complainants under the charter, strictly construed and plainly conveyed.

The presumption of law is that the General Assembly intended to do in fact what they plainly purported to 181
do in the act. And the intention of the General Assembly is the law. The liability is individual and not proportionate.

Angel and Ames on Corp., § 611–2.
2 Coke upon Lyttleton, 232, *b.*, § 378; 233 *b.*
9 Georgia, 213; *McLeod* vs. *Burroughs.*

Both the assetts of the corporation, and liability of the 182
stockholders, are a "trust fund and pledge" for the payment of the debts of the bank. 1 Sanders on Uses & Trusts, 280, 281, (1) note 7, and will devolve upon his executors to preform.

22 Howard, 391–2; *Ogilvie* vs. *Knox*, F. Ins. Co.
10 Metcalf, 569–to 76–7; *Grew* vs. *Breed.*

This question of a trust was thoroughly discussed in 183
Higetower vs. *Thornton*, 8 Georgia, 503, par. 16. The court, in this case, then examined at length the English and American cases, all of which have held the doctrine that the creditors of a dissolved corporation have an adequate remedy for the enforcement of their claims, both against the assetts and property of the corporation, and in case of the individual liability of the stockholders, 184
then against the individuals who compose the corporation, and this, notwithstanding the dissolution of the corporation has become absolute by regular judicial proceedings and judgment.

Again, in *Curran* vs. *State of Arkansas*, 15 Howard, 304, it was held, First, that the capital stock of a company is a fund set apart by its charter for the payment of its debts, 185
which amounts to a contract with those who shall become its creditors, that the fund shall not be withdrawn and appropriated to the use of the owner or owners of the capital stock; Second, that on the dissolution of the

corporation, its effects are a trust fund for the payment
186 of its creditors, who may follow them into the hands of any one not a *bona fide* creditor or purchaser for value without notice. The same question was discussed and decided in 1 Otto, 49–51; *Upton Ass'n* vs. *Tribicock*; 1 do., 59 to 61; *Sanger* vs. *Upton Ass'n.*

In 19 Georgia, 349; *Robinson* vs. *Lane*, it was directly held "that although by rule of common law, forfeiture
187 of a bank's charter may extinguish all debts due by the corporation, yet the collateral undertaking of the stockholders under a section of the charter which makes them individually liable for the redemption of the notes of the bank will remain unimpaired.

In *Hargrove* vs. *Chambers*; 30 Georgia, 606–7, LYON Justice says; "suppose we admit that the corporation is
188 dissolved, how does that affect the liability of the stockholders? Their liability is independent of the bank and exists for a different reason. They are by the charter to be liable for this debt in their individual capacity; what does the continuance or dissolution of the corporation have to do with the individual rights or liabilities of its members? Nothing whatever. The liability of the defendant is created by his own act, in derogation of the
189 chartered privileges and must remain until satisfied, or released by the creditor."

In the present charter the legislature made provision for the protection of the assets of the corporation in case of its dissolution, as follows:

"Sec. 23. That any real estate, bills, notes, moneys, profits, or other property whatever, which may, on disso-
190 lution of said corporation, be owned or possessed by it, shall be held by the directors of said bank for use and benefit of all persons holding shares in said corporation at the time of its dissolution, and their legal assignees and

representatives, in average and proportion to the amount of said shares."

191

Chief Justice SHAW says (3 Mason 313, *Wood* vs. *Dummer*); "The stockholders are privies to the trust, (partners in the transaction) and subscribe for the stock, (*cum onore*) agree *quassi contractus* to assume the burden of the redemption of the estate or liability created;" and this was the price paid by the defendants in this action for the grant of the franchise or estate in the grant conveyed to the corporation.

192

The defendants as stockholders of the Merchants' Bank, assumed to indemnify and save harmless the bearers of the bank bills in the contingency of the bank's failure, by the payment of the debts of the bank.

This same question was raised in the pleadings in the case of *I & T.*, *Green* vs. *The Exchange Bank, et al*, 92 Otto 509; but without effect in that case.

193

Has this court jurisdiction of this action?

This action was brought by a non-resident complainant for the benefit of himself and all other creditors in like condition. The complainant has made proof of debt before the master of a sum exceeding twenty-eight thou. sand dollars, (folio 103) and other complainants have 194 united in said suit and proved claims exceeding twenty-seven thousand dollars in the cause.

The defendants plead that the jurisdiction of this court is ousted in this action in consequence of a receiver having been appointed by the State court to take charge of the property, assets and effects of said Merchants' Bank previous to the commencement of this suit against the 195 said stockholders.

This action is brought as an action of *debt* arising on the 4th section of the act of charter of the said Merchants'

Bank, for its bills issued and circulated as money in
196 proof of claim of debt before the master in the cause, against the stockholders, defendants as the indemnities for the debt due to the bearers of the bills, in the contingency of the failure of the corporation.

That contingency (the failure of the bank) is shown to exist by the appointment of said receiver, as plead by the defendants. And the jurisdiction of this court has attached upon the proof of the failure of the corporation.
197 The bank bills proved in the cause exceed $50,000, and the jurisdiction of this court is proved on that point. It is an admitted fact that said bank suspended specie payment in November 1860, in conformity to an act of the legislature, but that said bank continued its general business of receiving deposits, making discounts, paying checks and current liabilities, and declaring dividends
198 out of its net profits to its stockholders until March 1865, when it closed its doors, in consequence of the closing of the war, and the annihilation of Confederate currency used by the bank. That the bank became insolvent on or about the 1st of March, 1865, there can be do doubt, but insolvency of the corporation is not a cause of action against the stockholders, but "upon its failure," (Theo
199 G. Barker's brief, folio 79) and he adds, "or suspension of payment."

Accept his version of the term "*failure*" to be at the date of the suspension of payment, and when did that point of time occur? Certainly not while the bank was in its full tide of successful business, and returning to the State, its statement of profits of more than seventy thousand dollars per annum, and this state of facts existed up
200 to the closing of its doors, occasioned by the collapse of the war. (Record, folio 123, and public documents herewith exhibited.) But the question arises did the bank fail at that date by the closing of its door

for public business. By implication "the master found the date of the closing of the doors of the bank" to be 201
the date of the failure of the bank." But the question here arises whether the closing of said bank for business at that date, March 1, 1865, was such a failure as contemplated by the statute necessary to bind the stockholders who held shares at that time, to indemnify and save harmless the bearers of the bank bills. Was the act of closing the doors for business, such an act of condition broken of 202
the grant as to bind the stockholders as liable for the debts of the corporation. There was an implied failure at that date. But no actual default, by protest of its bills; suit upon its debts, assignment by the corporation, nor any act of bankruptcy shown before the appointment of said receiver under act of March 13th, 1869.

Suspension of the corporation not a legal failure; assignment or actual default necessary to give public notice. 203

1 Speer, South Carolina Law Opin., 458 and 477; *State* vs. *Bank of South Carolina.*

2 McMullin, South Carolina Law Opin., 451½; *State* vs. *Bank of Charleston.*

8 Georgia, 476 (6,) secondly; *Lane* vs. *Morris;*

22 Wallace, 593; *Ross* vs. *Jones.*

And the following are parts of statements of said Mer- 204
chant's Bank, made to the Comptroller General of the State, exhibited in the public documents of the State of South Carolina, as follows, to wit; Statement of the average weekly condition of Merchant's Bank of South Carolina, at Cheraw, made to the Comptroller General of the State, in conformity to the Acts of the General Assembly of 1840 and 1855, requiring the monthly reports of the banks. 205

REPORT FOR JANUARY, 1860.

206

Capital.	Bills in Circulation.	Net Profits.	Domestic Exchange.	Specie.
$400,000	$540,846	$58,087	$658,051	$35,808

REPORT FOR NOV., 1860. (Date of suspension of specie payments.)

$400,000	$308,460	$71,597	$508,639	$29,855

REPORT FOR JANUARY, 1861.

$400,000	$318,316	$56.279	$335,952	$33,677

REPORT FOR SEPTEMBER, 1861.

$400,000	$187,027	$68,141	$224,913	$29,652

207

REPORT FOR NOV. 1st, 1869.

		Loans and Discounts	Real Estate.	Nat. Currency.
$400,000	$141,411	$62,000	$3,600	$50.

The reports of the banks of South Carolina for the 1862 to 1869 are not found in the published reports of the Comptroller General's office, nor in the public documents of the reports of the General Assembly for those
208 years.

Now, taking these sworn statements of the returns made to the Comptroller General of the State, by the officers of said bank as required by law, and who can say that said bank failed in November, 1860. These facts shown are a flat contradiction of that assertion. The law does not presume a failure until the fact is shown; and that fact
209 must be shown conclusively.

22 Wallace, 593; *Ross* vs. *Jones.*

This question has authoritively been adjudicated by the highest courts of the State. In the case of the *State* vs. *Bank of Charleston*, to annul its charter for suspension of payment, HARPER, Justice, says: "A private corporation created by the Legislature, may loose its fran-
210 chises by a mis-user or non-user of them, and they may be resumed by the Government under a judicial proceeding upon a *quo warranto*. The various American cases brought to our view from New York, Pennsylvania, Ala-

bama, and Indiana were proceedings by *quo warranto*, to enforce a forfeiture for abuse, and in none of them is 211
it questioned to be the proper process.

In short, I have found no case, or authority, in which there is a doubt or suggestion to that effect, or that the continuing to exercise the corporate franchise after an act of forfeiture, is not an usurpation.

Then the bank, though forfeited in contemplation of law, continued to exist, *de facto*, so as to render its trans- 212
actions valid. And this is by no means a thing unknown to our law. Such is the familiar case of administration granted, when there is a will and executor; the acts of the administrator are valid until his appointment be revoked. Such too is the case of public officers who have failed to take prescribed oaths.

The banks thus existing, the act of 1839 was passed, 213
which provides, "that the last installment of $50 on the increased capital stock may be paid at such time as the president and directors may call therefor." The original charter required those installments to be paid at a specified time. * * * * *

But when the Legislature, by law, declares that a corporation shall continue to exist, can it be doubted that 214
this is a waiver of a previous forfeiture. To say that a corporation existing by authority of law is not a corporation *de jure*, would be an absudity in terms. The case of "*The People* vs. *Manhattan Co.*, 9 Wendall, 351, is an authority expressly in point."

2 McMullen, South Carolina Law Opin., 451–2; *State* vs. *Bank of Charleston.*

1 Speer, South Carolina Law Opin., 458; *State* vs. 215
Bank of State of South Carolina.

This being the law in South Carolina, as interpreted by the highest court of the State, then who can doubt

but that the Merchants' Bank of South Carolina, at Che-
216 raw continued to exist, *de jure*, until December 1st, 1869, or until the appointment of said receiver. No actual default or act of bankruptcy being shown before the failure to comply with the terms of said act of March 13th, 1869, and the appointment of a receiver under said act was in consequence of said failure.

The complaint sets out (Record, folio 10,) "That said
217 Merchants' Bank of South Carolina, at Cheraw, some time previous to the 1st day of December, 1869, failed to pay their bills fo credit, known as bank-bills, and continued so to fail to pay their bills of credit up to December 1, 1869; and that subsequently, on the day of 18 , in accordance with the provisions of said act, last mentioned, William Godfrey, was, * * * appointed receiver of the property and assets of said bank," before
218 the commencement of this suit.

If this Supreme Court find that the act of March 13, 1869, was a waiver of the penalty ot forfeiture of said bank's charter up to December 1, 1869, and that said corporation continued to exist *de jure* until that date, then this Supreme Court should amend the findings of the master, and enter the date of the failure of said bank in
219 the decree as of that date, or remit back the record to the Circuit Court for the correction of the findings of the master from March 1, 1865, to December 1, 1869, and to direct the entry of the decree when so amended, in conformity to the opinion of this court, and the averment made in complainant's bill. (Folio 10.) That no change in the list of stockholders of said bank has been
220 made by sale of stock or transfer of snares for value, but that the same persons who held shares on the 1st day of March, 1865, are still the holders of the same shares held at that date. No conflict whatever of jurisdiction exists, or shown to exist between the action of the re-

ceiver in the State court, and the action of the complainants in the United States Circuit Court. 221

The actions are against different parties, and for different liabilities. I apprehend that no cause can be shown, and in fact, that no cause exists to oust the jurisdiction of this court in this cause.

Are the rights of action limited to holders of bills, held before default of the bank? 222

A bank-bill is a promissory note payable to the bearer on demand, and intended to circulate as money. Byles on Bills, * 9. (By force of the statute, but not of the promise.)

3 Strobhart's Equity, S. C. Opin., 351; *Johnson* vs. *S. West R. R. Bk.*

Morse on banks and banking, says: It is familiar 223
that the title to bank-notes, passes by mere delivery. It has also been seen that the receiver of bills has the position of an original promisee of the bank. He does not take as by an assignment, only the title of the person paying them over to him. He need only receive them in the usual course of business, for a full and fair consideration, and in good faith. His title is then un- 224
impeachable by any body, though they may have been put in circulation fraudulently, or may have been stolen from the bank or from a subsequent holder.

Bay vs. *Codington*, 5 Johnson, Chan. 54, and cases there cited, and especially—

Goldsmith vs. *Lewis* & Co.'s, Bank, 12 Barber, 407.

In *Bullad* vs. *Bell*, 1 Mason 243, Chief Justice STORY 225
says:

"A note payable to bearer is often said to be assignable by delivery, but in correct language there is no assignment in the case. It passes by mere delivery, and

us that this construction of the law is the best calculated
236 to carry into effect the purpose of the legislature. * *
It was argued that, although the bills were negotiable, yet
the statute liability when once fixed is personal to the
then holder, and cannot pass to any other person by
transfer of the bill. But we cannot feel the force of
this argument. If the statute had provided that the
persons then holding the bills should be entitled to
claim, &c., there would have been more force in it; *but*
237 *the same power that created this liability, could as easily annex
it to the bill and make it pass with the bill, to any one who
should become the holder, and this we think is precisely what
the statute has done.*"

Grew vs. *Breed*, 10 Metcalf, 569, was another case
which arose under the same provision of the statute of
238 Massachusetts, in which the claim of the plaintiffs was
opposed upon this ground, and upon others, that the bills
sued on had been taken from a broker at a discount, and
on an agreement that they should not be put into circu-
lation within a limited period.

In their opinion, the Court say: "It is agreed on all
hands that this limited and qualified statute liability of
239 the stockholders to make good any loss to those holding
their bills, was intended to give greater security and
credit to bank-bills, than to any other species of negoti-
able contracts. It would be a heavy clog upon the cir-
culation of bank-notes as currency if each party taking
them should be deprived of this statute liability of the
stockholders, by their showing even that the bills were
irregularly, clandestinely, or corruptly issued by the offi-
240 cers entrusted by the corporation with the power of issu-
ing them. * * * The fact that bank-bills are taken
of a broker at a discount and on an agreement that they
shall not be put into circulation within a limited period,

* * * is not constructive notice to one taking them that they were issued clandestinely by the officers and not by the full authority of the banking corporation." 241

In *Johnson* vs. *S. W. R. R. Bank*, 3 Strobhart's Eq., 351, JOHNSTON, Chancellor, in delivering his opinion, says: "Now these are the qualities which the law has affixed to, and the purposes which the law has declared are to be accomplished by, bank-bills. The subserving the purposes which the law has determined may be ac- 242 complished by such paper, is the object for which its issue is authorized. The public policy is, that it shall answer this object and design by fulfilling, not one purpose alone, but all or any of the purposes which its legal qualities fit it to accomplish, as the occasion may require. It is vain, then, to talk about *public policy* without looking into all of the particulars in which it is concerned. The 243 man who does not take a bank-bill as money, but who purchases it at a depreciation according to its market value, is a part of the public and is entitled to rely on his security. He would be no less one of the public and equally entitled to rely on the security of the bill, though he bought it at a depreciation at the counter of the bank itself. The man is a part of the public, and to be recognized and protected as such, who does not take bank- 244 bills as money but receives them upon pledge as securities. He does not cease to be a part of the public, nor loose his right to be protected as of the public, though the pledge be made to him by the bank itself. The things received in all these cases are still bank-bills, without any mutation of the legal qualities or incidents inherent in them, produced by the manner in which, or the purpose 245 for which, they are received. If the purpose is lawful, and the bank-bills according to their legal effect and qualities, whether regarded as money or as securities for

money, will accomplish it, and the contract be upon a
246 good and lawful consideration, the law must, upon grounds of public policy, uphold the transaction, and when called on enforce the bills for the benefit of him who has received them." (Opin., page 351–2.)

Though the holder of a bank-note buys it at a discount he may collect it at par.

26 Georgia, 27,—1, 2, 3,—*Robinson* vs. *Beale*;
8 Wallace Opin., 63–4, *Furman* vs. *Nichols*.

247

The statute authorizing the making of the bills (8 Statutes, 73, sec. 19), the issuing and circulating the bill as money upon condition—remains a valid and continuing right until condition broken. The chose-in-possession remains in the bill until the chose-in-action vests upon demand of payment. Protest of complainants' bills was made in April and August, 1870, (Record, folio 103,) and
248 complainant received his bank-bills in 1868 and 1869. (Record, folio 127.)

26 Georgia, 27, (1), (2), (3), *Robinson* vs. *Beale*;
8 do. 476, (6), secondly, &c., *Lane* vs. *Morris*;
56 do. 205–6–7, *Cohen* vs. *Prater*;
10 Nat. B'kc'y. Reg., 289–93, *Schober* vs. *Bk. N. C.*

249 That when complainant acquired his bills in 1868 and 1869, without protest or dishonor, said bank bills possessed the validity of a present issue.

Morse on banks and banking, pages 396–'7.

The authorities above cited seem sufficient to establish the conclusion that the mere fact of possession for value as holders and owners of the unpaid bills of the Merchants' Bank of South Carolina, at Cheraw, is sufficient
250 to establish the ownership of the said demands; and that it is of no consequence when, whether before or after failure, or at what price, whether for little or much the said bills were acquired by the complainants, said bills

are the unpaid debts and obligations of said Merchants' Bank, and the complainants are therefore entitled to 251
bring this action, not upon the *jus in re*, but upon the *jus ad rem;* it is not a suit upon the bills, (as proved in the cause) but it is for the debt of the corporation as shown to exist, for which the defendant stockholder is liable, "*prout debuit.*"

Complainants' suit would not lie against said stockholders if brought on the bills of the bank; said defend- 252
ants as stockholders do not owe the bills of the bank, and this suit is not in that form; and there is no declaration on the bills; but in the contingency of the bank's failure they stand as indemnities for the bank's debt, and by this proceeding in equity we show the bank's default and indebtedness to complainants, and ask for a decree against the defendant stockholders for the sum for which they
are individually bound as indemnities to pay the debts 253
of said bank. If the suit was upon the bills of the bank then the plea of jurisdiction would be well plead; but this suit being brought for the debt of the bank the plea fails—this right of action exists on the debt of the bank, but no right of action exists on the bills against the defendants.

But, the defendants say, that if the stockholders are indemnities, then said indemnities are released by the State 254
by giving time to the corporation for making payment. But complainants submit that this plea will not avail, that the corporation did not owe any pecuniary debt to the State; that the State did not give time to the corporation for the payment of its notes.

12 Wheaton 554; *McLemore* vs. *Powell.*
16 Wallace 566; *Specht* vs. *Howard.* 255

The bills in circulation were payable on demand, and no demand upon the corporation has been shown before December 1, 1869; and the proof is that the circulation was

steadily reduced (fol. 121) and public documents submitted
256 after suspension of specie payment until the appointment of a receiver. The act of March 13th, 1869, did not give time to the corporation to pay its debts, the corporation was not indebted to the State, but was indebted to the public and said act emphatically compelled the corporation to resume payment and encouraged the corporation to do so by releasing all penalties and forfeitures, and all
257 cause of penalties and forfeitures of loss of its charter incurred before December 1, 1869.

It was an implied grant of a new lease of life to December 1, 1869, rather than a forfeiture of existence; and if the master had found December 1, 1869, as the date of failure of the corporation, *that date*, is sufficiently alleged in complainant's bill. (Record, folio 10.) And if the point of time in the failure of the bank between
258 March 1, 1865 and December 1, 1869, should prove material to the saving of complainants' rights, then this Court should pass upon the fact of the date of the legal failure, and the master's report having been excepted to on that ground, (Record, folio 128) and it is so found. Then this Supreme Court should remit the record back to the said Circuit Court for the proper findings by the
259 master, and when so found, then to stand as the decree of this Court. No sale of shares or transfer of shares for value has been made after March 1, 1865, (Record, folio 116–7), and therefore the same parties would be liable, and liable to the same extent, under a new or amended decree, that they are under the present decree.

2 Black 539, *Ogilvie* vs. *Knox.*

260 A strict construction of the act of charter, strict proof of default of the bank, and a strict application of the statute of limitations as plead in bar of said suit by the defendants, is insisted on by the appellees.

A constructive default of the bank is a legislation of the statute of limitations into existence by the court, or an application of the statutes of limitations plead (not within the purview of the act strictly construed) may tend to bar complainants action, which is not barred by a strict construction of the act. Complainants claim that an actual default of the bank must be shown to give jurisdiction to the statute of limitations plead in bar. The statute plead in bar, being penal in its nature, and in restrain of right, the actual failure of the bank, and condition broken in the grant, must be conclusively shown to give any jurisdiction to limitations. 261 262

6 Wallace 395–6; *United States* vs. *Hartwell;*
9 Bacon Abridg, 247 Stat., I–3.

The strict terms of the statute plead in the action must not be stretched to aid the creditors, nor diminished of their strict construction to shield the debtors. 263

Any variation of the application of the statute of limitations beyond the words contained in the act constitutes a legislation by the court of the application of the act in the cause as the court applies it; and a strict construction of the act plead is deemed to be the law.

91 Otto, 35–6; *Farmers' National Bank* vs. *Deering.* 264
28 Iowa, 509; *Lease* vs. *Vance.*

Is the individual liability of the stockholders proportional to the amount of stock held by them respectively, or is it fixed by the charter, and limited to a liquidated sum?

The second exception to the decree of the Circuit Court is as follows: "That the stockholders who were proved to be such at the date of the failure of the bank, * * * if liable at all, are only liable under a proceeding in equity, by which all of the liabilities of all of 275

the stocknolders can be ascertained and a fund for distribu-
266 tion created by a just contribution in equity among all who are liable. That the proceedings in this case authorizes judgment and execution in favor of each complainant for the full amount of their respective claims against each of the stockholders to the full amount of the total liability of each, with no provision for ascertaining either the whole sum to be contributed, the parties who
267 are to contribute, nor the proportionate share of each contributor to the common fund."

This position seems little else than a flat contradiction of the express words of the statute in question. The section sets out fully "that in case of the failure of said bank each stockholder * * * shall be liable *and held bound individually* for any sum not exceeding twice the amount of his shares."

3 Richardson Eqty S.C. 226: Sacket Harb Bk vs Blake:

Angel & Armes on Corporation, sec. 611, defines the individual liability of the stockholders to mean, "each individual member of the corporation to be personally liable for the whole amount of its debts as though no act of incorporation existed." That is to say, in the contingency of the bank's failure, each stockholder shall be liable personally for the debts of the bank, to the extent
269 liquidated by the statute. If the debt of the bank proved is less than the sum liquidated by the statute, the creditor takes judgment for the sum proved. If the sum proved by the creditor is more in amount than the sum liquidated by the statute, then the creditor takes judgment for the sum liquidated by the statute, but not for his debt proved.

Sacket Harb Bk vs Blake: 3 Richardsons Eqty S.C. 238:

270 56 Georgia 563; *Boyd & Son* vs. *Hall.*

The theory of the appellants is founded in equity, and if all of the stockholders of the bank were solvent then such a decree as contended for would do no injustice to

the complainants, but in the present action, to grant such a decree as the appellants suggest, is practically to anihi- 271
late and destroy the results of complainants' action. Certainly not one-eighth part, and probably not one-twelfth part of the sums due on the decree in this cause is collectable. (See folio of this argument.) And if the object of the Legislature in enacting said 4th section was to secure payment to the holders of the bills, as admitted in defendant's answers (Record, folio 62), then the intentions of the Legislature in enacting said 4th section are 272
as much the law, though not fully expressed, as if set out and fully stated in the act.

6 Wallace, 395–6; *United States* vs. *Hartwell.*

9 Bacon Abridg, Stat. I, 247, par. 5.

1 Edward's Chan., N. Y., 276; *McDurmo* vs. *Lorilard.*

But the appellants have lost their rights in equity to a 283
proportionate contribution from all stockholders upon equitable grounds by fraudulently conveying 834 shares of the stock of said bank to the corporation after the date found by the master as the date of failure. (Record folio 20 to 23.) Date of transfer without consideration October 16, 1865. (Record folio 117.) No right to equitable remedies exists where fraud is shown to have been at- 274
tempted by the parties.

4 Bouvier Inst., § 3841;

Bump on Fraud Conv., 76–7:

Herr on Fraud and Mist., 123–4.

A proportional liability is often introduced into bank charters in express terms, each stockholder being made liable for such a proportion only of the debts of the bank 275
as his individual stock bears to the whole capital stock. Such, for instance, was the provision of the charters in *Crease* vs. *Babcock*, and *Grew* vs. *Breed*, 10 Metcalf, and *Pollard* vs. *Bailey*, 20 Wallace. In all such cases a stock-

holder who pays his proportional share, is discharged—
276 That is, his obligation under that statute, but from the immense losses sustained in South Carolina in 1783 by the issue of paper money, the Legislature in granting these bank charters, enacting the individual liability of stockholders modled after, or in conformity to, the act of the Colonial Assembly June 17, 1712. (9 vol. stat., S. C., 759.) Under that act, the parties circulating the bills, gave bond with security for double the amount of the
277 bills circulated by them. That was a liability under seal. Under the 4th section the stockholders are liable and *held bound*, by a writing under seal by force of the statute implying a bonded liability. Under the act of 1712, the individual liability was enacted by a sealed writing. Under the present charter the stockholders' liability is enacted by force of the statute, bound
278 by the terms of the statute, under the great seal of the State. Art 1. Sec 16 Constitution: 1 vol Stat S.C. 187.
Art 7 Sec 16 Do 1 " Do . . 170.

In 1 Mason 243, Chief Justice STORY says: "Here, then, the law has declared that the stockholders shall be liable to pay a specific sum, and it imposes on them a duty to so do. * * * The law has created a direct liability, a liability as direct and cogent as though the
279 party had bound himself under seal to pay the amount, in which case debt would undoubtedly lie. The law esteems this an obligation created by the highest kind of specialty."

1 Sharswood's Blackstone, book 1, *185–6;
6 Bacon Abridg., 377, D. Lim. of Actions;
3 Comyn's Dig., *265, (A—4), covenant.

280 And created in derogation of common law it must be construed strictly.

9 Bacon Abridg. Stat., (1) (G.) 236½;
1 Sharswood's Blackstone, bk. 1, page *89, ¶ 7.

And construed strictly there is no proportionate liability in this charter. 281

12 Statute at Large, 221, sec. 4;

McLeod vs. *Burroughs*, 9 Georgia, 221, ¶ 3.

If all of the defendants were solvent, a decree of proportionate contribution would do the complainants no harm. In that case it might save a suit between stockholders liable, but it would be great injustice to the complainants to allow the rules of equity to override the 282
plain meaning of the statute to their detriment. That liability is fixed by the charter, and is in plain terms extended to any sum proved, within twice the amount or value of stock held by any individual stockholder. The individual liability is the only liability included in this statute.

Is the present action barred by the lapse of time? 283

Two positions are taken by the appellants on this point: First, that this action being for the enforcement of a penalty or forfeiture, must have been prosecuted within six months after the cause of action arose; Second, that this action, if not for the enforcement of a penalty or forfeiture, is still barred by the former statute of limitations of this State, which requires all actions of debt 284
grounded upon any lending or contract without specialty, to be commenced within four years after the cause of action shall have accrued.

First. The first position is taken with reference to the former statute of the State, which is in these words: "That as to all penalties and forfeitures mentioned in any statute or act now in force in this province, wherein 285
a particular time is not mentioned in the said statutes or acts for the suing of the said fines and forfeitures by civil process, by action of debt, plaint, or information, the

same shall be prosecuted within six months after the cause
286 of action or suit given, and not after." (2 Stat. at Large, 586.)

The discussion already presented in this argument as to the nature of the liability imposed, and to whom due, will make it unnecessary to discuss this position further. If we have shown that the liability sued on is not for a penalty or forfeiture, and is not in the nature of a pen-
287 alty or forfeiture, then the limitation provided for the bringing of such actions is not applicable to the present case.

Second. We assume that the right of action accrued on the failure of the bank, (according to the master's finding—folio 115,) March 1, 1865.

The present action was brought December 2, 1870.

288 The statute of limitations relied on by the defendants as having barred this action in four years, is found in 2d vol. Statutes at Large, 585, sec. 6, to wit: "That all actions of tresspass, *quare clausum fregit*, all actions of trespass, detinue, actions *sur-trover* and replevin, for taking away goods and chattels, all actions of account and upon the case, (other than such accounts as concern the trade
289 of merchandise between merchant and merchant, their factors or servants,) all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent reserved by indenture, all actions of covenants, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them which shall be sued or brought at any time after the ratification of this act, shall be commenced and sued
290 within the time and limitations hereafter expressed, and not after; that is to say, the said actions upon the case other than for slanders, and the said actions for accounts, and the said actions for trespass, debt, detinue and re-

plevin for goods and chattels, the said actions of covenant and the said actions of tresspass *quare clausum fregit*, with- 291
in three years next after the ratification of this act, or within four years next after the cause of such actions or suits, and not after; and the said actions of trespass, of assault and battery, wounding, imprisonment, or any of them, within one year next after the ratification of this act, or within one year next after the cause of such actions or suits, and not after: and the said actions upon the case of words, within six months after the ratification 292
of this act, or within six months next after the words spoken, and not after."

Is this action founded upon any lending or contract without specialty?

What are the facts in regard to the subject-matter in this action? The cause of action laid in the complaint, 293
(Folios 6 and 7,) is for the debts of the bank; that the bank became indebted, and failed, and on that contingency of failure, then the stockholders at that date each became individually liable to pay the debts of the bank, and that liability is evidenced by the statute, and the statute is set out.

Now as to the proofs in support of the action. Com- 294
plainants put in proof of the indebtedness of the bank to them, the issues and bills of the corporation, issued in its legitimate business, circulated as money at a gold value, before August 7th, 1861. (Record, folio 127.)

There was no lending or contract between the bank and the original bearers of the bills. There is no authority in the charter for said bank to loan its bills, and 295
we cannot presume that the bank violated its charter in this respect. The bank-bills are called the creatures of the corporation. But this is untrue. In fact, the bank-bills are not the creatures of the corporation, but they are

creatures of the law; their form designated by law; their
296 validity established by the law; the law created the bank-bills as an estate upon condition for the use of the corporation during the period limited by its charter and limited the amount that could be issued.

As before stated, the bank did not lend the bills, it paid the bills out as money to the original holder, as of intrinsic value—a circulating medium—money in hand;
297 and the original holders paid and transferred the same to the present holders for value as money. These transactions are regulated by the terms of the statute (8 Stat. at Large, 72, Sec. 16) as between the corporation and the bearer of the bills. If any contract existed between the bearer of the bills and the corporation, it was upon that part of the charter promising payment on demand, (redemption of the bill in money) and this is what the law
298 exacted of the corporation. It was the condition of the grant of the estate.

Even as to the corporation, it was not a lending covenant, or contract to pay money at a future day. It was the delivery of the *quassi* contract made valid by the law, or a part of the estate upon condition, created by the user of the franchise and made valid as a circulating me-
299 dium, under the law. The law created that estate upon condition. The terms that the law annexed to the bank bills or parts of said estate was, *that they were payable* (now) to the bearer on demand. The terms did not constitute a lending or contract, but it was the acceptance of a valid pledge or part of an estate created and made valid by the law; redeemable on demand in the terms
300 that the law annexed to and required in the bill, to make it valid. "*Payable on demand*" is said to be the contract of the corporation in the bill, but this is not so, this is a part of the law that fixed the condition of the bill to make it valid, that gave the estate currency and made it to cir-

culate as money. It was illegal and void without that term prefixed in it. 301

It cannot be said that any transactions, either borrowing, lending, contract or covenant was made or occurred between the complainants and defendant stockholders. They are strangers. The liability of the defendants is wholly and entirely grounded on the statute of incorporation; by proof of the fact, that said corporation has failed and is indebted; by that showing the liability of the 302
stockholders to pay the debts of the bank, accrues, (Complaint, folio 7) and the complainants being the bearers of the debts of the bank, the stockholders as indemnities to pay the debts of the bank, (as shown in this argument, folio 107–'8) assume the liabilities, *cum onore*, agree *quassi contractus*, in the contingency of failure, to pay the debts of the bank to the creditors of the bank. By the user of said franchise of charter a condition was annexed 303
therein and thereto. That condition was founded on the law of the franchise granted, not in any natural right or common law right, due to, or belonging to the said corporation or stockholders, (because the circulation of bank bills as money without a charter, is felony in South Carolina; and the individual liability of stockholders, to pay debts of the corporation is unknown to the common 304
law,) but each stockholder in this bank as a privy to the trust estate granted, assumed by the subscription and purchase of shares, the benefits and liabilities of the conditional estate in this franchise granted under the law. They organized under the statute, put in operation the eetate upon a trust, and by this act of user, they assumed the condition and fortunes of the corporation, and by its 305
failure said stockholders became liable, (and held bound) and *bonded by the terms of the statute*, to pay the debts of the corporation to the bearers of the debts.

It was not the covenant, contract or promise of the
306 stockholders (verbal or written) to pay the debts of the corporation on its failure; but it was the condition in the law, that each stockholder should individually indemnify and pay the creditors of the bank in case of its failure, to the extent set out and liquidated in the statute. He held shares of stock of a fixed value; his liability was liquidated on each share held.

307 A condition in law is that which the law implies without the express words of the party.

3 Comyn's Dig., Condition, * 136, R.

2 Coke upon Lyttleton 232*b*., Sec. 378.

2 Coke upon Lyttleton 233*b*.

1 Speer S. C., Pa. 444, 467 & 516; *State* vs. *Bank of S. C.*

Shars. Blackstone; Bk. 2, p. 299, Par. 5.

308

The subject matter in this action arises under the laws of the State, and not upon the contract of the defendants to the action. Any contract between these complainants and the defendants, could have passed only by assignment, whereas these bank-bills being creatures of the statute passed by delivery as money, by vir-
309 tue of the charter, without borrowing, lending, contract or assignment. The bank-bills produced as vouchers are only evidence of the indebtedness of the corporation. The estate made legal by the legislature upon condition granted, and the statute set out in the bill upon which this suit is founded, is the evidence of the liability of these defendant stockholders to pay the debts of the corporation. That liability is in fact the redemption of
310 the estate upon condition granted by the legislature. The statute, *and the statute alone*, is the evidence that binds these defendants to the performance of the liability proved in this cause to exist. The debt exists.

The bank has failed. The stockholder is liable for it by force of the law. An action on a statute,—when it lies. 311

1 Comyn's Dig., debt (A. 1,) * 434.

For a recompense, an action lies by the party grieved.

1 Comyn's Dig., * 438.

If the statute gives no form of declaring, the plaintiff must state the special matter.

2 Coke's Institutes, 200–486.

1 Comyn's Dig., debt * 437.

312

7 Massachusetts, 202; *Biglow* vs. *Comb. & Con. T. P. Co.*

10 Massachusetts, 370; *Jeffers* vs. *Blue Hill T. P. Co.*

So in every case were the statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his benefit, contrary to the said law. 313

1 Comyn's Dig., debt (F.,) * 442.

3 Comyn's Dig., debt A–1, * 381.

If the complainants' bill, declaring a cause of action against these defendant stockholders, founded on the indebtedness of the bank as shown by the statute, is true, how is it possible that this action shall be affected by the statute of limitations of four years, above quoted. 314

There was no bargain, sale, exchange or transaction, between these complainants and defendants in this cause. They are strangers, no transaction of any kind has occurred between them. The vouchers of debt of the corporation were not made by the defendants; nor were they made by the corporation; legally speaking, they were made by the law. The law gave the authority to the corporation to make the issue, and without this authority of law, said issue would have been a fraud (null and void,) therefore the law was the creator of the bills issued, and the corporation the mouth-piece of the law, 315

that circulated and gave life to the creature that the law
316 made legal. The law prescribed the form of the bill. The law authorized the issue of the bill. The law created the estate upon condition for the benefit of the defendants, upon the user of the franchise by them, and enacted the liability of the defendants upon condition broken. Where is the lending, covenant or contract in all these transactions, as between the parties to this
317 action. I trust none can be shown, for the reason that none exists in fact.

This proposition of law being true, then the present action is not within the purview of the act of limitations plead.

This is not a case of lending, contract, or covenant made between party and party, such as the act plead was
318 intended to effect, and bar in four years; but this is a liability arising *quassi contractus* under the statute, and not included in the statute of limitations referred to.

So, some words import and make a covenant in law though there be no express covenant; though the reservation be to a stranger.

1 Modern Repts., (Per Hale) 113.

2 (James) Croke Repts., 240; *Ever* vs. *Stricland.*

319 And this is precisely the condition of complainants' in this action. Their suit is brought upon the debt of the bank against the indemnities made liable under the statute to pay the debts of the bank; upon the contingency of failure of the corporation.

"A contract is an agreement between two or more par-
ties, to do, or not to do, some particular thing."

320 1 Parsons on Contracts, 6, Sec. 2.

Where is the contract? Where is the covenant? Where is the lending? *None.* This is plainly a liability under the law, created to secure the repayment of an estate

upon condition, when the failure of the beneficiaries to maintain the condition of the estate inviolate occurs. 321

The beneficiaries accepted the user of the condition of the grant; they reaped the benefits of the condition in the grant; they ought to be liable for the debts incurred by the exercise of the grant, in the exact form and manner prescribed by the statute. If the grant is conveyed by the law, the liability ought to have the force of law, and exist during the time enacted by the law. "A law exists for the time it was enacted, unless sooner repealed." 322

1 Bouvier Ins't., p. 48, § 8, ¶ 112–3.

2 Coke upon Lyttleton, 236 *b*, Sec. 384.

State of Penn. vs. *U. S. Bank*, 17 Pennsylvania Repts., 400.

"So, if an estate be granted under a limitation, there is a condition in law that, if the contingency upon which the estate is limited happens, the estate determinates." 323

3 Comyn's Dig., Cond. T., *138.

The estate having determined in this case by the failure of the bank, the liability accrued at that date, and the right of action is complete. *The assignee of the reversion shall have advantage of it.*

Coke upon Lyttleton, 215 *a*.

The right of action being founded upon the law, is a specialty of the highest order. "Kings' statute is the highest record of the realm." 324

Westminister Primer, p. 186, 2 *b*.

6 Bacon Abridgment, (D.) 377.

5 Comyn's Dig. Parliament, (H—1) *285.

Coke upon Littleton, 98 *b*.

1 Shars. Blackstone, p. *185‡. 325

The statute a specialty equal to a sealed writing.

Terry vs. *Calnan, et. al.*, Mans. Opin., CARPENTER, J., Circuit Court of Richland, South Carolina.

18 Georgia, 340–1, (3,) (4;) *Banks* vs. *Darden.*

326 30 do. 599, Secs. 5, 6, 7, 8, 9; *Hargrove* vs. *Chambers.*

But there is another reason why the complainants' right of action is not barred in this suit. This action is to enforce a trust or the right of action given by the statute against an indemnity. The act of charter was a trust created by the Legislature of South Carolina, conveying an estate upon condition (or corporate franchise upon
327 condition) to certain persons denominated stockholders. By the user of the franchise, the estate was put into legal existence as a thing of value, and as a privy to the trust, each stockholder was bound by the terms of the statute.

3 Mason 320, *Wood* vs. *Dummer*;

50 Georgia 580, Note 3, *Atkinson* vs. *Keith.*

328 The 4th section made each stockholder individually liable (as a security) and held bound, (as a bonded indemnity) for the sum set out and liquidated by the statute. By the user of the franchise the trust attached by act of the defendant, and became a subsisting liability; and having voluntarily assumed the liability under the law, for the profit, use and increase of his private estate, as
329 a matter of right and justice, he should be held bound under the statutes for the debts thereby created and circulated on the public for his benefit.

17 Wallace 610; *Sawyer* vs. *Hoag, Assignee.*

If each defendant had executed a mortgage, (as required by the bank act of 1712, 9 Vol., Stat. 759,) in exact conformity to this statute, and made liable individally, in trust to save harmless each creditor of said Merchants'
330 Bank for the debts of the bank, could the beneficiaries in the mortgage (the bearers of the bills of the bank) have had any right of action under the mortgage, against said defendant stockholder before the actual default of the

corporation was legally shown by direct proof? (22 Wallace 592–4.) Then if the plea of insolvency, or ceasing 331
to do business, or the endorsement on a bank note unprotested, would not apply to show actual default and condition broken so as to determine the estate in a mortgage, why should the trust estate in this action determine, and the liability of the indemnity accrue, before the actual default of the corporation is proven?

The endorser of a note is not held until protest is 332
made; why should the indemnity for a direct trust be held liable before the terms of the condition are actually broken. A constructive default is a legislation of the act into existence. I trust no reason can be shown why the liability of the stockholder should accrue, before the actual default of the corporation is fully proven. In the case of a direct trust where an estate is conveyed to A 333
for the use of B, no time can bar the equitable rights of the latter.

1 Sander's on Uses and Trusts, 310; (3)
30 Georgia 774–'5. *Berthune* vs. *Dougherty*;
23 Mississippi 88; *Payne* vs. *Bullard*;
3 Mason 320; *Wood* vs. *Dummer*;

In a mortgage trust to secure a debt represented by a 334
note of hand, the note may be barred by the statute of limitations yet the creditor may bring suit and foreclose the mortgage to enforce the payment of his debt.

8 Georgia 325; *Elkins* vs. *Edwards*;
4 Cushing 443; *Crane* vs. *Paine*;
11 Connecticut 160; *Bellknap* vs. *Gleason*;
26 Maine 330; *Joy* vs. *Adams*;
19 Pickering 535–'7; *Thayer* vs. *Mann*; 335

And why is this so? The note is a contract debt by parol; while the debt secured by the mortgage is by the trust in the record recited as a specialty. The note was

the mere promise to pay; the mortgage was the trust on
336 record to secure the debt. The creditor stipulated for two remedies against his debtor to enforce the collection of his demands. These two remedies are totally distinct; the one by an action at law on the note, one of the written evidences of debt; the other by a bill in equity to procure sale of the mortgaged property evidenced by record.

1 McAllister D. C., Cal. 497; *Sparks* vs. *Pico.*

337

So have complainants two remedies on their bank bills of the Merchants' Bank.

They have an action at law directly on the bills against the corporation; and upon proof of the failure and indebtedness of the bank, they have the right of action by bill in equity, to prove the indebtedness of the bank, and
338 to subject the stockholders (as indemnities to bill-holders) to the payment of the debts of the bank, in the form and to the extent set out and recorded in the statute.

In the words of McAllister, Justice, "he who would avoid such security must show payment."

1 McAllister, 499, *Sparks* vs. *Pico.*

The condition is broken. The trust was determined.
339 The debt is proven. The defendants are shown to be stockholders, liable on the record of the statute for the debts of the corporation. Nothing but the payment of the debt will satisfy the condition imposed by the law.

The current authorities sustain the principle that a right or cause of action arising *ex-contractu* under a statute (*quassi contractus*) is a specialty, unless the same is
340 specially excepted out of that rule by the terms of the statute itself.

In *Pease* vs. *Howard*, 14 Johnson, N. Y., it is held that a statute enacted by the Legislature for the benefit of a person is a specialty, although the code of the State of

New York had, by its terms, limited all causes of action (without exception) upon any lending or contract, to a 341
period of six years. The learned judge in passing upon the question of limitations in that case, refers to the code of the State of New York, ch. 120, sec. 1, Revised Statutes. He also refers to the principles laid down in the case of *Jones* vs. *Pope*, 1 Sanders' Reports, 36. There it was held that the statute of limitations did not apply to said cause of action:

342

1st. Because the action is not founded upon any lending or contract, and the statute does not limit all actions of debt generally, but only actions of debt founded upon a lending or contract without specialty, and this is a debt created by the law, without any lending or contract, and therefore is not limited or restrained by the statute.

The reason given for this ruling is shown in the case 343
of *Hodsden* vs. *Horridge*, 2 Saunders, 65–6.—"For the statute intends to limit those actions only which arise upon a bare contract without any writing under seal, the prosecuting of which actions a long time after they first accrue is often a great occasion of perjury in witnesses and of oppression to the defendants in said actions."

It is, therefore, upon the principle, that a statute is a 344
record of the highest dignity, and that it is the public evidence, and not liable to false swearing to show that the liability or debt exists; and the vouchers of the debt in this case are the creatures of the law, which the enacting of the law put into existence, therefore the liability of the indemnities under the law should remain a specialty during the time for which the law or charter was enacted.

345

That is the sovereign will as expressed by the legislature. The charter extended and continued until January, 1876. (Record, folio 5.) The right of action given by

the statute in this suit to the complainants, does not de-
346 pend upon covenant, lending, or contract between the complainants and the defendants, but it does depend upon the words of the statute and the proofs in the cause.

The condition broken in the grant is the gist of the action. The proof of the existence of the debt of the corporation, establishes the liability of the defendants. It is not upon the bills of the bank, nor upon any cove-
347 nant, lending, or contract between the complainants and defendants that this suit is brought; but it is simply and plainly brought on the indebtedness of the corporation under the statute. If the legislature had the authority to make the grant upon the terms conveyed, and the defendants entered into the estate by the user of the franchise, as charged in the bill, then the defendants are (*quassi contractus*) individually liable and held bound as
348 by a bond, according to the wording and meaning of the sovereign will as expressed in the act, and the proofs made in the cause.

Ross vs. *Jones*, 22 Wallace, Opin. 592.

Chief Justice STORY, in 1 Mason, 254, says: "The action of debt is a proper remedy where a determinate
349 sum of money is due from one man to another. (Book 2, Blackstone * 465.) Blackstone says: "Any contract, in short, whereby a determinate sum of money becomes due to any person, and is not paid, but remains in action merely, is a contract of debt, and taken in this light it comprehends a great variety of acquisition * * debts of record, debts by special, and debts by simple contract. A debt of record is a sum of money which appears to be
350 due by the evidence of a court of record * * * this is a contract of the highest nature. * * * Debts upon recognizance are also sums of money *recognized* or acknowledged to be due to the crown or a *subject*, in the

presence of some court or magistrate, *with a condition* that such acknowledgment shall be void upon the appearance 351
of the party, his good behavior, and the like; and these, together with statute staple, and statute merchant, &c., if forfeited by non-performance of the condition, are also ranked among the first and principal class of debts, viv: debts of record; since the contract on which they are founded is witnessed upon the highest kind of evidence, viz: matter of record. * * Note.—These debts cannot in
pleading be impeached or affected by any supposed de- 352
fect or illegality in the transaction on which they are founded," &c. * * * To support the action of debt, it is necessary that there should be a determinate sum of money due from one person to another. This sum must be determinate in itself or capable of being determined by an averment. (1 Chitty Plead., § 101, § 113.) This debt
may be created by the act of the parties, or by the act of 353
law. It is created by the act of the parties in cases of contract, and by act of law when founded on the provisions of statutes. In assumpsit, the action rests entirely upon the promise; in debt, it is founded entirely upon a sum of money due. * * * In the case at bar, the defendants are indebted to the complainants in a determinate sum, not originating from any express prom- 354
ise, but from the express provisions of a statute."

On page 108, Chitty says: "Debt is a more extensive remedy for the recovery of money than covenant or assumpsit, for it lies to recover money upon legal liabilities or upon simple contracts expressed or implied, whether verbal or written, and of contracts under seal, or record, *and on statutes by the party grieved*, or by a common in-
former, whenever the demand is for a sum certain, or is 355
capable of readily being reduced to a certainty."

This action against the defendants is not founded upon a simple contract, as in the cases of bills of exchange of

notes at hand (for the bank-bills are created by the au-
356 thority, and made legal by the statute), but this action is brought upon a speciality, to wit, a statute.

Comyn's Dig., Debts, A. 1;
2 Coke's Institutes, p. 650.

The statute of 2 Edward 6th, 1 Chap. 13, enacted: That if any person should take away tythes without setting forth a tenth of the same, he should forfeit treble the value of the tythes thus taken away. This statute neither
357 provided by what form of action, nor by whom the forfeiture should be recovered, but it was determined that *the party grieved, to wit*, the proprietor of the tythes, should recover this forfeiture by an action of debt. In the present action, the liability only extends to two-thirds of the amount of the estate conveyed, one-third being secured by the cash paid as capital, the balance of the estate
358 was bailed by the individual liability.

8 Statutes at Large, 72, Sec. 16 and 17;
See argument of Solicitor General, 1 Mason, pp. 277 to 286.

In the language of Chief Justice STORY, 1 Mason, 287: There are two questions in this case: 1st. Whether the plea of limitation be a good bar to the action. 2d.
359 Whether the action itself be well brought.

In respect to the first question, the statute of limitations of South Carolina is a mere transcript of the English statute, 21 Jac., 1, Chap. 16, Sec. 3, (heretofore quoted) bars "all actions of debt grounded upon any lending, covenant, or contract, without specialty, all actions of account and upon the case (other than such accounts as concern the trade of merchaudise), all actions
360 for arrearages for rent reserved by indenture, * * * shall be commenced and sued within the time of limitation hereafter expressed, and not after, that is to say, the said actions upon the case, other than for slanders, and

the said actions for accounts, * * * and the said actions for debt * * * within three years next after 361
the ratification of this act, or within four years next after the cause of such suits or actions, and not after. [The defendants to this action do not specially plead the above act in bar of said actions, nor in direct words refer to it, they simply plead the lapse of time in bar of said suit.] (Record folios 77, 91, 97.)

Nothing can be clearer than that this is not a case of 362
lending; and it would be very artificial reasoning to consider it a case of contract.

It is certainly not a case of express contract, and the most that can, by the utmost straining, be asserted is, that it is a case arising *quasi ex-contractu*. It is, in truth, a mere legal liability created by statute, which may furnish the ground or consideration of a contract, express 363
or implied, but it is not of itself a contract. The reasoning in Mr. Justice Blackstone's Com. (book 3, pp. 160–1) on the subject of implied contracts in causes of fines, forfeitures, amercements, and judgments, is very refined and ingenuous in theory, but it has never been to its full extent admitted into practice as the foundation of legal remedies. If it were universally true, then *indeb-i-tatus assumpsit* would lie to recover *a fine on a criminal sentence,* 364
or on a penalty or forfeiture on a penal statute, which certainly cannot be pretended. And even supposing that the law, for the sake of a remedy, would allow a party, by a fiction, to change a wrong into a contract, it does not follow that the wrong is merged into contract until the party has bound himself definitely to consider it exclusively in that character. If a person unlawfully con- 365
verts and sells the property of another, it is properly *a tort*, yet the injured party may waive the *tort* and bring assumpsit for the proceeds. But until he has so made

his election and created an implied contract, the wrong-
366 doer cannot protect himself by any defence founded upon the supposed existence of a contract. In the present case the complainants have not declared upon any contract (they have declared specially on the 4th section of the charter, Record, folio 7, for the debt of the bank), nor has the law necessarily created one, and therefore in this view the plea cannot on principle be supported. But if it were otherwise, the statute of limitations applies only
367 to contracts not grounded on a specialty. Now, the present action is founded on a statute which the law deems for this purpose a specialty, and for this reason, also, the plea is bad. If the case were new, therefore, we should have no difficulty in overruling the plea, but the point has been directly decided by authorities which cannot now be controverted.

368 1 Sanders' Eng., 37, *Jones* vs. *Pope;*
2 ditto, 61–5, *Hodson* vs. *Horrge;*
Comyn's Dig. Tempts. (G.—15);
Croke's Carolus, 513, *Tallory* vs. *Jackson;*
30 Ga., 599–601, 774–5, *Hargrove* vs. *Chambers;*
15 Howard, 308, *Arthur* vs. *Com. R. R. Bank;*
91 Otto, 60–1–2, *Sanger* vs. *Upton, Assignees.*

369 Complainants submit that the liability of the defendants in this action is a subsisting trust created by law, and therefore is not subject to the running of the statute of limitations. The statute does not say that the bearer of the bills shall sue, but the statute does say that "in case of failure of the bank each stockholder shall be liable and held bound individually." The words "*held bound*" are therein interpolated for a purpose. What is
370 the plain and natural meaning of those words? They are to qualify and show the extent of the liability enacted. What is a simple contract (shall be liable)? What is a bond (shall be liable and held bound)?

As in the Bank Act of 1712, each person circulating said bills of credit gave his bond with security for double 371
the amount of the bills circulated; so, in this bank's charter, each stockholder is liable and held bound individually, "bonded personally" to the extent liquidated by the statute. That liquidated sum is to the extent of the unpaid part of the estate granted in the franchise. (8 vol. Stat. 72, secs. 16, 17.) The true meaning and object of the act are thus clearly shown. And the intentions of the Legislature and the objects of the Legis- 372
lature in support of the public policy of the State, is the law of this case.

3 Strobhart's Eq., 351, *Johnston* vs. *S. W. R. R. Bank;*

91 Otto, 726–30, *Nichols, Assignee*, vs. *Eaton et al.;*

91 do. 35½, Opin., *Farmer's Nat. Bk.* vs. *Deering.*

Again, the act of re-charter of the said Merchants' 373
Bank extended all of its rights, liberties, franchises, and liabilities until January 1, 1876. This being true, and said act being in derogation of common law, and conveying rights, privileges, interests, and liabilities not otherwise legal, said act of re-charter should be considered to have repealed or superseded all previous laws and acts of the State in conflict with this special enactment. Its 374
charter is a public record, continuing to January 1, 1876. Its right to circulate its bank-bills, made in the form prescribed in the charter, during the existence of the corporation, is legalized. And the indemnity to pay the bearers of the bills, in case of failure of the bank, is provided for so as to give currency to the circulation. The indemnity to the bearers of the bills is provided for in the individual liability of the stockholders to pay the debts of 375
the bank to the extent liquidated in the statute. All these things are a matter of public record. The sovereign will as expressed by the Legislature of the State—

the highest record known in law, and made a part of
376 and jealously guarded as the public policy of the State (Argument, folio), who can say that such liability as herein shown is a mere contract liability by parole, and subjects the said liability to the bar of the statute of limitations in four years? Can such construction of the statute be construed to express the true objects and intentions of the Legislature in enacting said 4th section of the charter? We think not.

377 Would the Legislature have provided two remedies to secure the payment of the debts of the bank to the bearers of the bills, if they had not intended to make the extraordinary remedy an available indemnity? The Bank Act of 1712 would have that import. The *lex loci* of the date of the charter, gave to the statute the validity of a specialty. 1 Statutes, 187, Constitution S. C., Art. 1,
378 Sec. 16.

Can such a construction of the act of limitations be given without a legislation of the act into an application in the cause? We think not.

But again: Is this action barred by the limitation of four years (assuming the right to be a parole contract)? (2 Stat. at Large, 585.) We assume that the right of ac-
379 tion accrued on the closing of the bank, March 1, 1865. The present action was brought December 2, 1870.

By the case of *Harley & Pressly* vs. *Ward*, 15 Richardson, 231, it was decided that the statute of limitations was suspended in South Carolina from Dec. 21, 1861, to Dec. 21, 1866, just five years. Only three years eleven months and ten days had, therefore, elapsed at the time of
380 the bringing of this suit, during the time which the action might have been brought. But by General Orders No. 10, from the military headquarters of the second district, all suits upon causes of actions arising between De

cember 19, 1860, and April 29, 1865, were stayed. This order included, of course, the present cause of action. 381
General Orders No. 10 and No. 164, dated respectively, April 11 and December 31, 1867, remained in force until July 1868 (the date of the adoption of the constitution of reconstruction). It is plain, therefore, that upon this reckoning this action was not barred at the date of its commencement.

The war ended in South Carolina on April 2d, 1866, 382
in theory (The Protector, 12 Wallace 701); and that the circuit courts of the United States were nominally opened for business on June 12, 1866, is true, but practically said court was barred to the commencement of this action by the stay laws of the State and by the military orders then in force, and of supreme authority in the District of South Carolina until July, 1868. See Act Sept. 2, 1868, 383
14 Stat. S. C., 87.

91 Otto 712, *Raymond* vs. *Thomas*;
15 Richardson 231, *Harlee* vs. *Ward*;
Act of Congress March 2, 1867, 14 U. S., Stat. 428;
Act of Congress July 19, 1867, 15 U. S., Stat. 14.

Act of March 18, 1869, as a pardon or waiver of past default of the corporation. 14 Stat., S. C., 212. 384

But, further, this complainant only came into possession of his bills, vouchers in this action, in 1868 and 1869 (Record, folio 127); and shall the statute be said to run against him as plead before his right of action vested in 1868–'9? If the transfer of the bill was legal at that date and his right of action vested at that date as shown, how could the statute plead have jurisdiction, and be in opera- 385
on against him before his right of action vested in the cause? (This question was thoroughly discussed in the case of *Terry* vs. *Anderson*, No. 39, this term.)

2d. Whether this action itself is well brought?

386 This is an action of debt on a statute. "Debts arise, or are proved, by matter of record, as judgment debts, by bond or specialties and by simple contract where the quantity is fixed and specific, and does not depend upon any future valuation to settle it."

Bouvier's Law Dic., 379, par. 2.

Debt remedies.—The name of an action used for the re-
387 covery of a debt *eo nomine* and *in numero*.

3——§1; Debt is a more extensive remedy for the recovery of money than assumpsit or covenant, for it lies to recover money due on legal liabilities, as for money lent, paid, had and received, due on account stated (Comyn's Dig., Debt A), for work and labor or for the price of goods, and a *quantum valebant* thereon (Comyn's Dig.,
388 Debt B, per Holt 206); or upon simple contract, express or implied, whether verbal or written, or upon contract under seal or of *record*, or by a common informer, whenever the demand for a sum is certain or capable of being reduced to a certainty.

Buller's Nisi Prius, 167. * * * *

It also lies to recover money due on any specialty or
389 contract under seal to pay money.

Strange Repts., 1089. Comny's Dig., Debt A,—4.
1 Term Repts., 40.

Debt is a frequent remedy on statutes either at the suit of the party grieved, or a common informer.

Comyn's Dig., action on Stat. E;
Bacon Abridg., Debt A.

390 In the present action, the charter creates the liability of the defendants to pay the debts of the bank to the bearers of the debt and that distinguishes this liability from a penalty; without the statute provision, the com-

plainants would have no such right of action and therefore it is a statute liability. "The law which is the 391
very highest kind of evidence of a legal liability having created a debt in favor of a citizen, in the absence of an express limitation, it can be subject to no limitation short of that which will bar a debt of equal grade, to wit: a judgment."

12 Georgia 113, *Neal* vs. *Briggs*;

4 Dana Ky., 574, *Bk. of U. S.*, vs. *Dallam et al.*

The words of the statute "shall be liable," import a 392
contract by parol, and the words "and held bound," "*ex vi termini*," import bound by seal or securely kept. The defendants have not plead that the liability sued on was barred by the act of limitation (1712) of South Carolina, and if actions of debt in South Carolina, founded on statutes of the State, are not embraced in the limitation act of 1712, the result is that there is no statute which 393
limits actions of debt founded on statutes of this State, any more than there is in regard to actions of debt founded on domestic judgments.

10 Georgia 169; *Lane* vs. *Morris*.

If the estate upon condition was created by the parol contract of the parties to pay the debts of the bank in case of its failure, then the estate would be governed by the 394
common law. But this estate upon condition having been created by law without the parol of the parties, it must be ruled exclusively by the statute. Shs. Blackstone's Book III, 157-8, Note 3. The right of action being for the *jus ad rem* (the performance of the condition), debt is the proper remedy. The estate upon condition being created by the statute, by the user of the fran- 395
chise; the defendants entered therein, upon the terms thereof and to the extent prescribed. The terms required one hundred dollars to be paid upon each share held and the statute gave to the corporation the right to issue

pieces of paper as money of real value to the extent of
396 three times the amount of capital paid in by the stockholders and by the issue of said bills as money, said stockholders became bail for the corporation in the manner and form, and to the extent prescribed in the statute.

1 Bouvier's Institute, § 913, par. 3.

By the user of the *franchise*, each stockholder individually assumed an express trust created by the law and
397 bailed his private estate to indemnify and save harmless the bearers of the debts of the bank (upon condition broken) to the extent liquidated in the statute.

Chief Justice LUMPKIN says: "An express trust created either by the act of the parties or by the appointment of the law, the statute of limitations does not begin to run in favor of the trustee so long as the trust continues and is
398 acknowledged to be a continuing subsisting trusts for the reason that the possessi on of the trustee is the possession of the *cestique* trust. But when the trust is denied, the statute will commence to run in favor of such express trustee.

8 Georgia 103, par. 2, *Keaton* vs. *Greenwood*;
30 Georgia 774–'5, *Dougherty* vs. *Berthune*.

399 In the case at bar the defendants acknowledged the subsisting trust up to January, 1865, by declaring a dividend from the earnings of the bank and accepting said dividend as the legitimate results of the grant.

Nothing can be better settled than that an action of debt lies for a duty created by the common law or by custom. (Hardress Repts., 485.) A *fortiori* it must lie where the duty is created by a statute.

400 Blackstone says: "That every person is bound and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence, or are assessed on him by the interpretation of the law. What-

ever, therefore, the law orders any one to pay that becomes instantly a debt, which he hath beforehand con- 401
tracted to discharge."

Sharswood's Blackstone, Book 3, pages 160–'1.

Without placing any reliance upon this refined notion of contracts it cannot be doubted that the learned commentator has expressed the true doctrine of the law.

Chief Justice STORY says: "Whatever is enjoined by a statute to be done, creates a duty on the party which 402
he is bound to perform. The whole theory and practice of political and civil obligations rests upon this principle.

When, therefore, a statute declares, that under certain circumstances a stockholder in a bank shall pay the debt due from the bank and those circumstances occur, it creates a direct and immediate obligation to pay it. The obligation may be collateral or not, but that is not a sub- 403
ject matter of inquiry. And to deny that it is a duty on the stockholder to pay the money, is to deny the authority of the statute itself, for a duty is nothing more than a civil obligation to perform that which the law enjoins.

* * * * * *

The law has created a direct liability, a liability as direct and cogent as though the party had bound him- 404
self under seal to pay the amount, in which case debt would undoubtedly lie. The law esteems this an obligation of the highest kind of specialty. Indeed, if debt would not lie in this case, it is inconceivable how assumpsit could.

There is no pretence of any express promise, and if a promise is to be implied, it must be because there exists a legal liability independent of any promise suffi- 405
cient to sustain one. * * * And if there exists a duty sufficient to raise a promise, then it is sufficient to sustain an action of debt.

Upon the most mature reflection, I am of opinion
406 that the action of debt well lies in this case.
1 Mason, 298–9.

Case: Is this an action on the case? Or is it a suit in equity, without the strict forms of legal pleading, but both in form and in fact, "an action on the statute?"

The complainants contend that this is a suit in equity, founded on the statute of incorporation of the bank,
407 wherein the strict rules of pleading and the exact requirements of actions at law, are not necessarily all observed to make the action valid.

1 U. S., Stat. at Large; Sec. 32, Act 1789;
Comyn's Dig.
Act. on Stat., A.–3, *435.

And as required by the rules and practice in equity,
408 the complainants have set forth their cause of complaint against the defendants; have fully stated in their bill why they did not have a direct action-at-law against the defendants, and praying that upon the evidence of the statute and the proofs to be discovered and made in the cause (folio of Record, 13), that a decree of judgment should be given against the defendants, in comformity
409 to the terms prescribed in the statute.

The present liability sued on, is termed by all of the elementary writers an "ex-contractu liability," accruing "*quassi contractus*" under the operation of the statute, and this is the almost universal ruling of the Courts.

8 Georgia, 499, *Hightower* vs. *Thornton*, and authorities cited.

410 S. Carolina Law Journal, pp. 221-4, *Hume* vs. *W. & W. Canal Co.*

This proposition being true, how is it possible that this action can be construed to be an action on the case.

Case: (latin casus) or trespass on the case "is thus defined" in practice. A form of personal action *ex-delicto*, 411
less ancient than the other forms; invented under the authority of the statute of Westminster, 2 (13 Edw., 1), C, 24, as a remedy for injuries to which other forms were not adapted, and intended to supply the defect, which, in this respect, was found to exist in the original scheme of personal actions. * * * It is the peculiar and appropriate remedy for injuries committed without 412
force, and where the damage sustained is only consequential.

1 Burrell Law Dic., 254.

This definition of the legal meaning of the term "case" as applied by the Courts, comports and agrees with the term and application of the word "case," used in the statute of limitations of 1712. It is there used in connection and refers to the *ex-delicto* liabilities barred, to 413
wit: "All actions of account, and *upon the case* (other than such accounts as concern the trade of merchandise,) * * * shall be commenced and sued within the time of limitation, hereafter expressed and not after,—that is to say, the said actions upon the case (*ex-delicto actions*,) other than for slanders, and the said actions for * * * debt, &c." Here the said term "*case*" is used exclu- 414
sively in connection with the *ex-delicto* liability referred to in the act. A *fortiori*, "if the term case is used exclusively with the *ex-delicto* form of actions, then it is not included and not applied to the *ex-contractu* form of actions." And in the language of Chief Justice STORY, "if by a fiction a wrong is changed into a contract, it does not follow that the wrong is merged into contract." A *fortiori* "if the case at bar is an action *ex-contractu*," it 415
does not follow that the action at bar is changed into an action "*ex-delicto*," *by prefixing the term case* before it, and thus subjecting it to the operation and penalties of the

act of limitations of 1712. The rule of equity forbid
416 any such transposition. Would the liability be changed in the action, if the complainants had averred that, upon the case stated, they demanded a decree of judgment, would that have changed the nature of the liability, and the equities in the rights of action to enforce it. We apprehend not. The Court sit to construe the laws as made, but not to change the law by construction, or by
417 a legislative interpretation.

15 Wisconsin, 28-31, *Oatman* vs. *Bond.*

Complainants submit that if the liability sued in this bill, can properly be termed an action on the case, then may any action on a bond which is given as indemnity for the debt of another or sealed writing conditioned to save harmless, &c., be termed an action on the case. In
418 this case the law having declared the liability, that liability is presumed to continue during the existence of the law, and the law expired January 1, 1876. The statute must be construed to exist and continue during the time for which it was enacted, unless controlled by some subsequent law.

State of Penn. vs. *U. S. Bank*, 5 Harris, Penn., 400.

419 There is no law in South Carolina, nor any decisions of the Court of the State subsequent to the passage of this act, limiting the right of action on this liability to four years, and, as abundantly shown, this liability is not within the purview of the act of 1712. The liability sued on in this action is not for the payment of the bank-notes vouchers of the debt of the bank, but this action is
420 for the payment of the debt itself of the bank. Although the right of action on the bills as against the corporation might be barred, yet the debt remains unpaid, and if the record of the debt exists of force, then the right

of action exists of force, against the defendants. The debt is secured by the record. 421

1 McAllister, D. C., Cal. 497 *Sparks* vs. *Pico.*

He who would avoid such a security, must show payment.

19 Pickering, 437 *Thayer* vs. *Mann;*

9 Wheaton, 497 *Hughes* vs. *Edwards.*

Again: In many of the bank charters the stockholders are made principal debtors by the terms of the 422
act. Such is the case in the charter of the Union Bank in the case No. 39, *Terry* vs. *Coskery*; heard at this term. In that charter the statute read: "that the persons and property of the stockholders in said Union Bank, shall at all times be pledged and bound in proportion to the number of dollars issued upon each of the shares, * * for the payment and discharge of the debts and con- 423
tracts of said bank." Here is an original liability, eminating with and dating from the issue of debt. But in the present charter no such liability was created. The liability in the present act was contingent, not upon the creation of the debt, but it was created and accrued by the failure of the bank. The condition broken was gist of the action. In the event of the failure the stockholder became liable, and without that, and without the 424
breach of the condition, no liability existed against them. The liability must be considered collateral, and not primary.

Pollard vs. *Bailey*, 20 Wallace, 525.

And the liability of the trustee, dates from the refusal of the performance of his trust, to wit: Dec. 1, 1869.

Can a stockholder owning bills of said bank set off 425
and bar his liability against the creditors of the bank at the time of its failure, by proof of said bank's bills in the cause?

A stockholder of said bank, being the bearer of the
426 bills of the bank, has rights in common with the complainants in this action, provided he has availed himself and complied with the terms of the suit. - If he has proved his bills in the cause, and the liability of solvent stockholders is sufficient to pay all of the debts of the bank, then in that case said stockholder holding bills should receive his full claim on said bills; but if, from any cause, the fund realized in said action against the
427 stockholders, will not pay all of the debts of the bank proved, then in that case, said stockholder bearing said bills should receive only his *pro-rata* share of the fund, as other creditors of the bank receive their *pro-rata* on their bills proved in the cause.

This is not an action upon account stated, or an action where mutual dealings, debts, credits and set-offs may
428 be made between the parties to the action, but this liability arises under the statute and is due to the creditors of the bank, (third parties) but, is not due to the corporation itself; and if the principles of equity are to be applied to one class of creditors, it must be applied to all of the creditors of said bank; and it would be unjust to allow a creditor of said corporation, who is a debtor to
429 the complainant, to reap a greater benefit from participating in this action by reason of being a stockholder, than a creditor of said bank who was not a stockholder. Their rights to *pro-rata* and full payment should be identical according to the debts of the bank proved in the cause. Said Richard A. Springs has averred in his answer to having redeemed and held in his possession, and still holds, nine thousand dollars of the bills of said bank.
430 If such averment is true, why did not said stockholder make proof of said bank bills in this cause. We have the averment, but where is the proof of the fact. This bill was filed in 1870, while this answer was not filed un-

til September 30, 1873, and the bills entirely omitted to be proved. But, I proceed upon the equities in the cause; 431
supposing said bank bills to have been filed in proof of debt, and that said Richard A. Springs was the only solvent stockholder in said bank; then to allow said bank bills as a set-off against said liability of said defendant, stockholder, is to practically grant a payment in full of the bills held by said defendant stockholder, and deny any payment whatever to the real complainants in the 432
action. But admitting the liabilities of the solvent stockholders to be collectable up to 50 per cent. of the debts proved, then to allow said bills as a set off at par, is to allow said R. A. Springs a payment in full upon his debt not proved in the cause, while the real complainants get only 50 per cent. of their debts proved; and this disposition of a trust-fund cannot be reconciled in equity.

Waterman on set-off § 381, (§ 375, * note;) 12 433
Georgia, 87, par. 21; *Jordon* vs. *Jordon.*

This defendant has averred the redemption of his bills as a counter-claim. The defendant's claim is, that he is indebted to the bank. This fact the complainants deny. Complainants insist that no cause of action ever existed by the bank, against the stockholders for the statute liability to pay the debts of the bank. The statutory lia- 434
bility did not belong to, nor accrue to the bank, and therefore could not be a matter of set off or counter-claim.

The liability of the stockholders in this action, was not to the corporation for debts due to the bank, but the liability sued on was for the indemnity given by the statute, to secure the payment of the debts of the bank 435
in case of its failure; and those debts accrued to and belong to the bearers of the bills, the creditors of the bank.

A counter-claim includes only causes of action existing
436 against the plaintiff on the record and on which an action at law might be maintained against him.

Waterman on set off § 382–3.

1 Barbour's N. Y. Chan. Prac., 138, note 44, 2nd Ed.

22 Barber, N. Y., Law 326, *Spencer* vs. *Babcock.*

2 Robertson, N. Y., 422, *McIlvain* vs. *Edgerton.*

19 Gratton, Va., 729, *Knox* vs. *Exchange Bk.*

437 13 Nat. Bankruptcy Reg., 445, *Scammon* vs. *Kimball Ass'n.*

The sufficiency of a counter-claim or set-off may be determined by the inquiry whether or not the substance of the facts stated would constitute a cause of action on behalf of the defendant against the plaintiff, if the plaintiff had not sued the defendant.

438 13 N. Y. Reports, 248 *Vasser* vs. *Livingston.*

4 Richardson, S. C., 183, *Bishop* vs. *Tucker.*

4 Richardson, S. C., 544, *Wilson* vs. *Dargon.*

8 Bacon Abridg, Set-off, 655–7–8.

1 McMullin Law, S. C., 211, *Cain* vs. *Spann.*

A set-off in bankruptcy.

14 U. S. Statutes, 526, sec. 20.

439 6 Cowen, N. Y., 693, *Johnson* vs. *Bridge.*

6 do. 264, *Wolfe* vs *Washburn*, Opin. 264–5.

1 Johnson, cases 170, *Prior* vs. *Jacocks.*

18 New York, 227. In the matter, Empire City Bank, Jonathan Purdy appealed, &c.

Sedgwick on the measures of damages lays down the rule: "The counter-claim must be one existing in favor
440 of a defendant, and against a plaintiff, between whom a several judgment might be had in the action arising out of one of the following causes of action:

1st. Out of a contract set forth in the complaint.

2d. Arising out of a contract in existence at the commencement of the action. Page 551, note 1. 441

Waterman on Set-off, §§ 19–20–22, *52 note.

It is not a matter of mutual dealings, debts, &c., between the stockholders and the corporation that is involved in this action, but the subject matter herein is the liability of the stockholders to pay the debts of the corporation. The defendant Springs has nothing to set off against the corporation; he owes nothing to it. His debt 442
is due to the creditors of the corporation as the indemnity to pay the bank's debts. And that indebtedness is created by the statute and not by dealings between the parties to the suit. This fact being true, *we submit*, no set-off can exist between the parties to this action, except it be given by the statute, and no right of set-off exists in the statute.

But, we are cited by the appellants to the case of *Carrol* 443
vs. *Green*, 2 Otto, 509, as an authority against us in this suit, and reference is made to the authorities therein cited.

In *Carrol* vs. *Green*, the liability of the defendants was held to be a contract by parole, or of the validity of a common law action, brought upon the case; but if we have shown in this argument that the right of action in 444
the suit at bar, is an action founded on the statute, and does not come within the common law rule nor within the purview of the act of limitations of 1712, then we are not bound by the reasoning or authorities quoted in *Carrol* vs. *Green*.

But, in order to arrive at a true and just determination of this cause, we propose, by permission of this Supreme 445
Court, to examine that opinion and discuss the authorities therein quoted.

In *Carrol* vs. *Green*, page 511, the Supreme Court say:

"From the last of February, 1865, four years expired on the 1st of March, 1869. But there are certain interruptions of the statute to be
446 taken into account. * * * The supreme court of South Carolina held that these acts arrested the effect of the statute of limitations from December 21, 1861, to December, 1866—*Wardlaw* vs. *Buzzard*, 15 Richardson, 158.— * * * From December, 1866, the statute was in full force. Four years from that time expired in December, 1870. The war in South Carolina ended on the 2d day of April, 1866.—The Protector, 12 Wall., 701.—The circuit court of the United States for South Carolina was open for business on and after June 12, 1866. * * * The statute of limitations of South Carolina in force when this cause of action
447 accrued, and under which this case must be decided, was that of 1712.—Angel on Lim., Appendix p. xcviii."

In this argument, folios , we have shown by the authorities quoted that this action is not founded on the common law, nor is it an action on the case, but that said action is an *ex-contractu* liability, founded on the record of the statute set out in the act of charter under the
448 great seal of the State, and therefore said liability sued on is not within the purview of the act of 1712, nor subject to the short bar of four years.

The ruling of the supreme court of South Carolina, in the case of *Wardlaw* vs. *Buzzard*, is an action founded on (notes of hand) a common law liability, showing the stay of the statute, on a liability of that character; but com-
449 plainants submit that said case is not a parallel case to the action at bar, neither should that ruling be an authority to bar the present action.

But, again, we have shown (folio) that the stay laws upon common law actions existed until December 21, 1866, and that the military orders No. 10, and No. 164, issued in South Carolina, continued that stay until July, 1868,—if we take that view of the case. The military
450 stays, here shown to have existed in South Carolina, were authorized by acts of Congress (14 Stat., 428,) March 2, 1867, and July 19, 1867, (15 Stat., 14,) and were legal and effective stays on civil actions within their scope,

and if said stays had been properly shown to this court, they must have saved the complainants' rights in *Carroll* vs. *Green*. And said military orders were legalized by the Legislature of South Carolina, 14 Statutes, 87. 451

But in the case at bar, the complainants base their right of action upon a different foundation, and plead the statute of charter as a specialty, and the law as a record of the highest dignity.

Bullard vs. *Bell*, 1 Mason, 243, and authorities cited. 452

That our right of action exists against the defendants by reason of the record in the statute, and the proof that the debt of the bank exists unpaid.

1 McAllister Cal., 498–504; *Sparks* vs. *Pico*;
8 Georgia, 325; *Eakins* vs. *Edwards*;
56 Georgia, 525; *Garvin* vs. *Welchel*;
19 Pickering, ; *Thayer* vs. *Mann*. 453

He who would avoid such a liability must show payment.

11 Connecticut, 160; *Belknap* vs. *Gleason*;
26 Maine, 330; *Joy* vs. *Adams*;
4 Cushing, 483; *Crain* vs. *Paine*.

In their ruling, in *Carroll* vs. *Green*, the court held said suit to be an action on the case, (*ex delicto*,) and the liability to be of the nature or validity of a parole contract under the common law, and therefore barred by the act of 1712. 454

But if we have shown to this court, conclusively, that a different state of facts exist in this cause from those implied in *Carroll* vs. *Green*, then we are entitled to the benefit of our showing in this cause. 455

In examining the act of 1712, we find the term "*case*" used exclusively with actions *ex delicto*, but do not find the term "*case*" used in connection with the action of

debt or any liability *ex contractu*. If our right of action
456 is *ex contractu*, this fact would seem to imply error in the ruling of the court in *Carroll* vs. *Green*, in connecting the term case to the ruling in that cause. It would imply a different state of facts from those shown to exist herein.

But again said opinion says, page , "case is a generic term which embraces many different species of actions. There are two, however of more frequent use than any other form of action whatever. These are assumpsit and trover."

457 Will any one contend that the action at bar is an action of assumpsit? Where is the promise? What is the evidence of the promise of defendants to the complainants? How was it given? The evidence of the liability of the defendants exists in the record of the statute; the statute is the legal evidence without the parol; and the statute cannot be contradicted by parol.
458 The statute is evidence in the cause without being proved; whereas the parol must be proved to be evidence in court. The promise is wanting.

Can this liability of the defendants be termed a promise; in the language of Judge STORY, (*Bullard* vs. *Bell*,) if so, it is by fiction and artificial reasoning, and not by the plain common sense term. And the same application
459 may be made to the term "*trover*." Where is the trespass, and how was it committed? How does the *ex-delicto* liability arise? We trust that none can be shown.

Where the lessee entered and enjoyed the premises, as in the case of *Goodwin* vs. *Gilbert* and *Newell* vs. *Hill*, they were liable under the common law for the occupying the estate; but in the case at bar no liability against the defendants arises under the common law. So, in
460 *Butler* vs. *Green*, 11 Alabama; and *Bowen* vs. *Bell*, 20; *Johnson* and *Wilkinson* vs. *Scott*, 17 Mass.; these cases, cited in *Carroll* vs. *Green*, are all actions arising under the common law, and arising under a different state of

facts, and subject to different rules of pleading from the case at bar.

461

Our right of action for the debt liquidated "*eo nomine in numero*," is complete by simply declaring on the statute, and upon the proof that the debt exists against the corporation while, in these cases cited the debt must be proven by parol to establish a liability.

The statute having declared the liquidated sum for which each stockholder is individually liable; they must 462 be held as liable personally for the whole debt of the corporation to the extent liquidated. There is no provision for contribution by stockholders, or a proportionate liability.

13 Wallace, 542; *Stockwell* vs. *U. S.*

And the court must not legislate into the statute what the legislature has not put there.

463

54 Georgia, 404; *Central R. R.* vs. *State.*

22 Wallace, 112; *Maryland* vs. *Railroad Co.*

But said opinion also cites *Lindsay* vs. *Hyatt*, 4th Ed. Chan., as an authority against us. In this charter, the law specially limited the liability of the stockholders, to the same liability as general co-partners, or joint dealers contracting a debt as if no act of incorporation existed.

464

The code of New York limited all common law liabilities of co-partners in trade to six years; and under the *lex loci* of the transaction, and the intentions of the legislature in enacting "that charter," the liabilities of said stockholders was therein limited to six years. That was the exact terms of that act. The bond or sealed instrument given by the corporation (without corporate authority,) and sued on by the complainants, was held to be 465 the debt of the bank, but not the debt of the stockholders; and that if it had been the debt of the stockholders it was a common law action and barred in six

years. The statute made it so; that was the limit in
466 act; but that is not our case. The issue of our bank bills and the right of said issue is authorized in the statute, their circulation is legalized by the statute, and the evidence of the indebtedness of the defendants a specialty of the highest dignity. It is true that the court ruled in that suit, that the action must be in "case" upon the joint evidences of indebtedness (the bond and the statute), but that ruling may have been an error of
467 the judge, or if it has any bearing on the action at bar, it tends to show that "case" may be used in *ex-contractu* actions; and that "case" may be used in both remedies *ex-contractu* and *ex-delicto* without significance. We submit that such is not the *lex loci* of this action in South Carolina.

468 Art. 1, Sec. 16 Constitution, Vol. 1 Statutes, S. C. 187;

Art. 7, Sec. 16 Constitution, Vol. 1 Statutes, S. C. 190.

The common law of England, adopted as the common law of South Carolina.

Preface Vol. 1, Stat. S. C., p. V, VI, to XIII.

In *Corning* vs. *McCullough*, the next authority cited,
469 was an action in assumpsit by a creditor of the Rossie Galena Company, for goods sold and delivered to the company, against a stockholder of the company for the debt thus created.

The charter made the stockholders individually liable for the debts of the company, in the same manner and to the same extent as general partners in trade, under the
470 common law.

The Code of New York limited the liability of *ex-delicto* actions to three years, and limited the liability of *ex-contractu* actions to six years. The lower court held

this to be an action *ex-delicto*, and therefore, under the code, it was barred in three years. 471

The plaintiff appealed and assigned as error this ruling of that court: "that the action was *ex-delicto* in its nature, and came within the meaning of R. Stat. § 297–8, § 31." The Court of Appeals reversed the decision of the court below, and in their ruling, p. 60 say: "It is competent for the legislature, in all cases, to amend, repeal or modify the common law, whenever amend- 472
ments or alterations are deemed proper and expedient. Such actions of the legislature are of frequent occurrence, but such statutory amendments do not necessarily or usually abolish the rules they affect, or change the course of the common law in relation thereto; and as a general rule the pursuit of the remedy in such cases where the amendatory statute is silent, will be by the 473
appropriate common law action, and not by an action on the statute." Here, then, the court held finally that the action was not *ex-delicto*, and barred by the short bar of three years, but that the action was *ex-contractu*, and had the full period and scope of time to run given by the charter. This time the charter limited to the common law rule of six years, "*a fortiori.*" This is precisely the right of action claimed by the complainants at bar. Their 474
right of action, is upon the law, a specialty of the highest record, both as against the corporation and the defendants. And complainants insists that they are by right entitled to the full period and scope of time given to domestic judgments, and records of specialty, before the bar of the statute of limitations shall be applied to defeat the action. 475

The short bar of four years applied in Green's case ought to be applied only to contracts not under seal nor of record, and actions accruing *ex delicto;* whereas we

have clearly shown that our cause of action arises inde-
476 pendent of any contract between the parties, and that the evidence of that right of action is a record of the very highest order; that full scope and period of time should be given to that record before the bar is applied. And, therefore, the authority of *Corning* vs. *McCullough* should not be considered as a ruling against us, but should be considered as a ruling strongly in complainant's favor.
477 Complainants have no right of action under the common law. They are not in court under the common law, but they are in court by force of the statute as recorded. If the statute is a record of specialty, then the complainants demand the benefit and binding force of a specialty in this action as applied to *ex contractu* liabilities of record.

1 McAllister, 498–504; *Spark* vs. *Pico*.

19 Pickering, 537; *Thayer* vs. *Mann*.

478 We are also cited to the case of *Baker* vs. *Atlas Bank*; 9 Metcalf, 182. This was a bill in equity on behalf of the creditors of the Nahant Bank to compel the stockholders to pay the debts of the bank.

1st. Said Atlas Bank was organized under a general banking law of Massachusetts, but was not organized under a special grant of charter.

479 2d. That liability sued for was a sum of money due to the bank, but was not enacted in the law as due to the creditors of the bank; whereas, in the case at bar, the grant is directly to the defendants, and the stockholders are directly bound in the statute to pay the debts of the bank. Exactly the reverse from this authority.

3d. That accepting the ruling of the court in that case,
480 it is not a parallel case with the action at bar, and the judge distinctly states that his ruling is not in conflict with the ruling in *Bullard* vs. *Bell*,—he having quoted it and referred to it as an authority that did not apply.

On page 196, the court says: "But the language of our statute of limitations (Rev. Stat., C. 120, Mass,) varies 481
materially from that of the statute of New Hampshire. By the 1st section of our statute it is provided, that all actions of debt founded on any contract or liability not under seal, * * * shall be commenced within six years next after the cause of action shall accrue and not afterwards.. That this case stated on the bill and answer, is within the express words of the statute of limitations, 482
cannot be controverted." Again, on page 198, the court says; "The demand sought to be enforced in this suit, was a debt alleged to be due to the bank. Whenever, therefore, the bank became insolvent by the loss of its capital stock, an action accrued to the bank according to the construction of section 30, which is contended for by complainants' counsel to recover a sum from the stockholders respectively equal to each ones share of the stock. 483
The statute, therefore, began to run in strictness immediately on the loss of the capital stock, certainly when the bank stopped payment, and after the lapse of six years from that time the debt was barred, and as effectually as though it had been actually paid."

This ruling then is upon the *lex loci* of the construction, of the law and not in conflict with the authority of *Bul-* 484
lard vs. *Bell*. Complainants claim that the authority of *Bullard* vs. *Bell* rules their case, while the judge delivering the opinion in this authority cited, declares emphatically that the cause is controlled by the *lex loci* of the transaction, and therefore, the authority of *Bullard* vs. *Bell* stands unimpeached by it.

Again: We are cited to the case of *Commonwealth* vs. *Cochituate Bank*, 3 Allen, 42, as a ruling against us. This 485
was a case somewhat similar to *Baker* vs. *Atlas Bank*, and was decided upon the same rulings. In this suit it was claimed that the statute creating the liability sued on,

was enacted subsequent to organization of the bank, and
486 therefore unconstitutional; and if the law was not unconstitutional, the action was barred by the *lex loci* of the transaction. That the local statutes of the State controlled the action (opinion, pages 48 to 50), and if the authority of *Bullard* vs. *Bell*, was referred to at all, such reference is not expressed in its opinion.

Complainants submit to the court that if the authority
487 of *Carroll* vs. *Green* is an authority intended to overrule the authority of *Bullard* vs. *Bell*, then this supreme court should avow and set forth the principles of law that rule and determine the principles of limitation that govern the rights of property and the rights of action, clearly conveyed under a statute. The authority of *Bullard* vs. *Bell* has been a standard authority of sixty years; a landmark to guide the rule of action and protect the legal
488 title to untold millions of property. There is scarcely a holder of a policy of insurance, or the owner of a bank-bill in his pocket in the land, but what are interested in the true, fair, and just rule of law on this question of the statute of limitations. Then, if that authority is not law, overrule it, and declare the law.

Say the constitutional court of South Carolina, in the
489 *State* vs. *Delcisseline*, 1 McCord, 52, "the importance of adhering to decissions of this court is becoming more and more manifest every day. A greater evil can scarcely attend a court in the last resort than that its decisions should be unstable and fluctuating. The very object of such a court is to give certainty to what before was uncertain. Its decisions become a rule of property and a rule of conduct [I would add of legislation too, as
490 the several bank charters will show], and ought to receive such support as to secure to them the unbroken confidence of the community." The learned judge who delivered this opinion, added, "that such was the res-

pect entertained by the bench in that Strte for their own decisions, that after ten years experience, he knew but 491
one case where the court had undertaken to review and reverse a former decision." And we will not be understood, of course, as denying to parties who have never been before the court the privilege of prosecuting a writ of error for the purpose of reversing any decision, sentence, judgment, or decree of any superior court of this State."

Thornton vs. *Lane*, 11 Ga., 490. 492

Are we called into court to prove our claim of debt against the defendants in this action? Not at all. Our right of action under the *lex loci* of this transaction is a record under seal; (1 Stat. S. C., Sec. 16, p. 187,) a specialty of the highest dignity, and when we establish the debt of the corporation, the law establishes the debt of the defendants, and in this case liquidates the liability. 493
If our claim of debt had been merged in judgment in 1865 against the bank, would it be pretended that our right of action would be barred in this suit against the defendants. (*Cherry* vs. *Lamar*, Man. Opin., Jan. Term, Sup. Ct., Geo.) We think not. And if not barred on a judgment from that date, shall it be barred on a statute?

What is a judgment? Judgments (says Blackstone,) 494
are the sentences of the law pronounced by the court upon the matter contained in the record. The judgment, though announced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law. It is the conclusion that naturally and regularly follows from the premises of law and fact, which stands thus: "Against him who hath rode over my corn, I may recover damages by law: but A hath 495
rode over my corn, therefore I shall recover damages against A." (Blackstone's Comm., Book 3, p. 396.)

It necessarily follows, therefore, from this definition

of a judgment, that it must be founded on some law of
496 the land; in other words, some law of the land must authorize such a judgment to be rendered for that cause. So in complainants action at bar, they exhibit in court vouchers of the debt of the corporation unpaid, and by showing condition broken in the grant, the law authorizes judgment to be entered against these defendants, otherwise it is the mere arbitrary caprice of the judge; his own judgment and not the judgment of the law.
497 Where there is no law, there is no transgression, and a judgment is the result of a transgression of the law, shown by the facts necessary to establish that proof in court. Therefore, a law is of superior dignity, and where it is enacted under seal, as in South Carolina, the law is a sealed instrument of record.

In the case at bar, the right of action is given by the
498 legislature recorded in the statute and by the production in court of the evidence of condition broken, which Blackstone terms the gist of the action. It is not the contract broken, but it is the violation of the law that gives the remedy and the law is the evidence of the liability of these defendants. If a judgment is not within the statute of limitations (*Cherry* vs. *Lamar*, opin. Sup.
499 Court Georgia.) how can a law enacted, subsequent to the limitations plead, be subject to or ruled by it.

The presumption of law is, that the subsequent statute repealed and annulled all parts of the act of 1712 that conflict with its provisions, if any conflict arises therefrom.

The statute sued on being in aid of the public policy
500 of the State, must be construed fully and strongly against the defendants.

3 Strobharts Equity, 351; *Johnson* vs. *S. W. R. R. Bank.*

HARVEY TERRY.

Supreme Court of the United States.

OCTOBER TERM, 1877.

WILLIAM GODFREY ET AL.
vs.
HARVEY TERRY, ET AL.
} No. 168.

POINTS AND AUTHORITIES PRESENTED IN MR. CHAMBERLAIN'S ORAL ARGUMENT.

I.

As to the Statute of Limitations.

(1.) The military orders not having been proved as evidence in the Court below, can this Court take notice of them?

(*a.*) It can; because (1) they are by distinct reference embodied in the Statutes of South Carolina; (Stat. at large, vol. 14, p. 87.) (2), because they are also recognized and referred to in the decisions of the Supreme Court of the State, as of equal authority with the Statutes of the State. (*Cosgrove* v. *Butler*, 1 S. C., 24. *State* v. *Jennings*, 15 Rich. 41.)

(*b.*) It can; (1) because they are wholly unlike in their nature and the circumstances under which they were issued, the ordinary General or Special orders of military commanders or of the War Department. To regard these

tial character in deference to the outward form they wear. When these orders were issued, the military commander was in the lawful exercise of the whole civil power of the State; he exercised the powers ordinarily exercised by the Executive, Legislative and Judicial departments of the State government. These powers he exercised not merely as a military officer, in the military sense, but as an officer or person clothed by Congress itself directly with these powers. His orders became *rules of civil conduct* as to *rights of property*.

(2.) To require now that such orders, thus made and enforced, shall not avail because not specially proved on the hearing, will be to deprive citizens of the benefit of *laws*, which they could not resist or question, on the ground of a technical rule of evidence.

3. This Court can take judicial notice of these orders under the general principles governing such cases.

"The Courts of the United States, moreover, take judicial notice, in an especial manner, of all the laws and jurisprudence of the several States in which they exercise an original or appellate jurisdiction.

The Judges of the Supreme Court of the United States are, on this account, *bound to take* judicial notice of the laws and jurisprudence of all the States and territories."

1 *Greenl. on Ev.* §§ 4 and 6.
See also *Owings* v. *Hull*, 9 *Pet.*, 607.

It is only asked that the Court will carefully consider *the nature and origin of these orders and the office they performed*, in deciding this point.

(2.) The time of commencing the action,—was it when the bill was filed and the subpœnas issued by the Clerk?

(*a.*) *It is specially admitted by the appellants, that the bill was filed December* 2, 1870. The subpœnas are tested on the same day.

This is the commencement of a suit in equity.

1 *Barb., Ch. Pr.*, 33

Angell on Lim, §330, and cases cited in note to same page. See also §312.

1 *Dan., Ch. Pr.*, 2 and notes.

(*b.*) Courts of Equity are not bound by statutes of limitation like courts of law. "They adopt them to assist their discretion."

2 *Story Eq. Jur.*, §1521 (*a*) and notes.

(*c.*) But it is for the appellants to show, *by affirmative proof*, that their plea is good. They in fact only show that the present record contains no evidence that the subpœnas were placed in the hands of the marshal before the 8th day of February, 1871.

We say our action was *prima facie*, at least, commenced when we filed the bill and had subpœnas issued. The legal presumption is that we did what we ought to have done, till the contrary is shown. There are many reasons which may have existed why no actual service could be made sooner than February.

(*d.*) In *Carroll* v. *Green*, 92 U. S., 509, it was assumed that the suit was commenced on the day the bill was filed and the subpœnas issued.

(*e.*) For statement of rule that the filing of bill in the proper office, is the commencement of the suit, as well as for numerous authorities, see *Pimental* v. *City of San Francisco*, 21 Cal., p. 358 (argument of Mr. Patterson).

II.

As to defect of parties defendant.

(1) This question not being one of jurisdiction, must have been seasonably made in the Court below before final decree.

It cannot be made here for the first time.

(2) The defendants knew of this alleged defect, or are chargeable with such knowledge, in the Court below.

(3) We were not bound to make others parties, because (1) the present liability is not *proportional*, as in *Pollard* v. *Bailey*, 20 Wall., 521, *Terry* v. *Tubman*, 92 U. S., 156, and *Crease* v. *Babcock*, 10 Metcalf, 525; but is fixed, absolute and several.

(4) On the theory which seems to be expressed in *Terry* v. *Tubman*, by this Court, that the liability "is like a guaranty of payment where resort may be had at once to the guarantor without a previous proceeding against the principal," — those stockholders who should pay more than their share of the debts, might have contribution from the other stockholders.

See, also, cases cited on page 22 of my former argument.

III.

As to proof of time of failure.

(1) It was clearly proved, as the record shows (fols. 114, 119, 122), that the failure took place March 1st, 1865.

(2) The order of reference (Record, fols. 44 to 46), expressly allowed the Master to report "any special circumstances."

(3) The finding of the date of failure was embraced by the order of reference, generally and particularly.

(4) If this were not so, the fact was found, duly submitted to the Court, passed upon by the Court, and the present objection was never before taken: namely, that the finding was not within the scope of the order of reference.